TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 231 131

THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

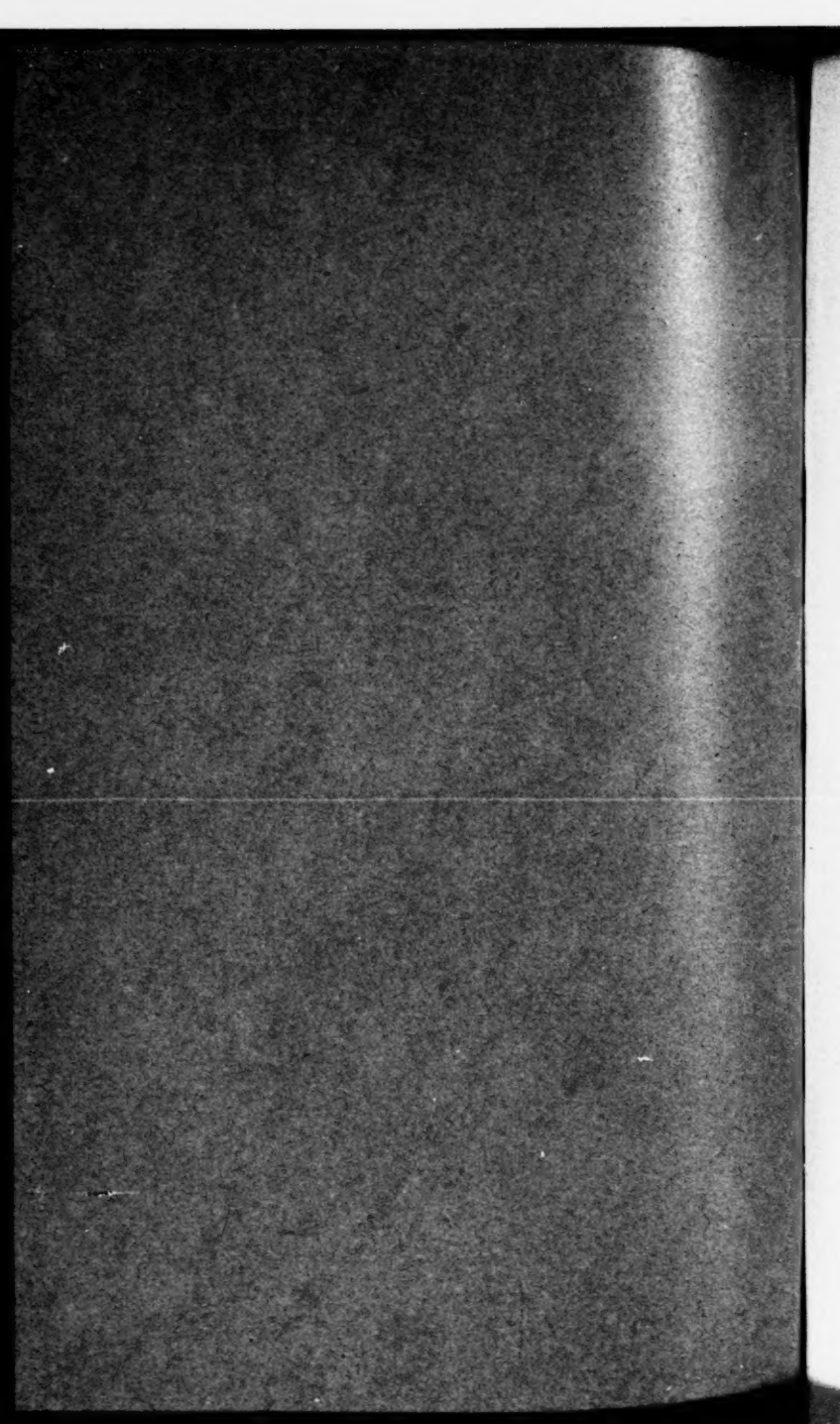
vs.

THE STATE OF MINNESOTA EX REL. THE RAILROAD AND WAREHOUSE COMMISSION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED AUGUST 9, 1900.

(17,866.)



18036

(17,866.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 381.

THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA EX REL. THE RAILROAD AND WAREHOUSE COMMISSION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Writ of error (copy)	*a*	1
Citation	*c*	1
Acceptance of service of citation	*d*	2
Petition for writ of error	*e*	2
Assignment of errors in State supreme court	*i*	4
Assignment of errors in Supreme Court of the United States	*n*	7
Bond on writ of error	*s*	10
Transcript from district court of Ramsey county	1	11
Petition for alternative writ of mandamus	1	11
Exhibit A—Order of railroad and warehouse commission, September 22, 1898	10	16
B—Order of railroad and warehouse commission, January 19, 1899	13	18
C—Order of railroad and warehouse commission, April 8, 1899	17	20
D—Order of railroad and warehouse commission, April 10, 1899	19	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1900.

	Original.	Print
Alternative writ of mandamus	21	23
Order to issue alternative writ of mandamus	34	30
Separate answer of the M. & St. L. R. R. Co.	35	31
Notice as to case and bill of exceptions, &c.	49	38
Case and bill of exceptions	49	38
Motion to dismiss	50	38
Motion for judgment	54	41
Testimony of E. B. Ober	56	42
Frank Nay	61	45
Frank Nay (recalled)	80	58
W. M. Hopkins	99	69
Ira B. Mills	108	76
W. M. Hopkins (recalled)	110	77
Ira B. Mills (recalled)	146	100
Thomas Yapp	148	101
Frank Nay (recalled)	156	107
Agreements and admission	158	108
Motion to strike out testimony	159	109
Findings of fact	160	109
Conclusions of law	160	110
Order for peremptory writ of mandamus	161	110
Memorandum: Opinion	163	111
Judge's certificate to case and bill of exceptions	164	112
Notice of settlement of case and bill of exceptions	165	112
Motion to grant new trial	166	113
Order denying motion	167	113
Judgment	168	114
Notice of appeal	171	115
Stipulation as to exhibits	172	116
M. & St. L. Exhibit A—Blue print	173	116
Plaintiff's Exhibit 1—Statement showing cost of operation, &c.	174	117
2—Statement showing cost of operation, &c	175	118
3—Statement showing mileage, rates, &c.	176	118
4—Statement showing total tons hard coal, &c.	177	119
5—Statement showing mileage, rates, &c.	178	119
6—Statement showing cost of operation, &c.	179	120
Syllabus	180	121
Opinion	182	122
Judgment	200	132
Order for judgment	202	133
Minutes of argument	204	134
Clerk's certificate	207	134

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because that in the records and proceedings and also in the rendition of the judgment of a plea which is in the supreme court of Minnesota, before you or some of you, being the highest court of law or equity in said State in which a decision could be had in the said suit between The State of Minnesota *ex rel.* Railroad and Warehouse Commission, as plaintiff, and The Minneapolis and St. Louis Railroad Company and The St. Paul and Duluth Railroad Company, defendants, wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity, a manifest error hath happened, to the great damage of the Minneapolis and St. Louis Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, *that*, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of July, A. D. 1900.

[U. S. Circuit Court Seal.]

HENRY D. LONG,
Clerk of the Circuit Court of the United States in and for District of Minnesota.

b [Endorsed:] Copy. State of ——, county of ——. U. S. Supreme Court. The Minneapolis and St. Louis Railroad Company, plaintiff in error, *vs.* State of Minnesota *ex rel.* Railroad & Warehouse Com., defendant in error. Writ of error.

c UNITED STATES OF AMERICA, *ss:*

To the State of Minnesota *ex rel.* The Railroad and Warehouse Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Minneapolis and St. Louis Railroad Company is plaintiff in error

and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Chas. M. Start, chief justice of the supreme court of the State of Minnesota, this 3d day of July, A. D. 1900.

CHAS. M. START,
Chief Justice of the Supreme Court, State of Minnesota.

d [Endorsed:] 12111. Original. U. S. Supreme Court. The Minneapolis & St. Louis Railroad Company, plaintiff in error, *vs.* State of Minnesota *ex rel.* Railroad & Warehouse Commission, defendant in error. Citation. Due service of the within by copy is hereby admitted, at St. Paul, Minn., this 3rd day of July, A. D. 1900. W. B. Douglas, attorney gen., attorney for defendant in error. Filed Jul- 3, 1900. Darius F. Reese, clerk.

e To the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota:

Now comes the Minneapolis and St. Louis Railroad Company, a citizen of the United States of America, by its attorney, Albert E. Clarke, and complains that in the records and proceedings and also in the rendition of the judgment in a suit between The State of Minnesota *ex rel.* the Railroad and Warehouse Commission of said State, plaintiff, and said The Minneapolis and St. Louis Railroad Company, as defendant, in the supreme court of the State of Minnesota, that being the highest court of law or equity in said State of Minnesota in which a decision can be had in said suit, and in which a final judgment was rendered against said defendant on the 13th day of June, 1900, in said suit, wherein it was adjudged that the law enacted by the legislature of the State of Minnesota, embodied in chapter 91, General Laws of 1895, and particularly in subdivisions B, C, and D of section three of said chapter, and any and all laws of said State which assume to confer upon the railroad and warehouse commission the power and authority to compel two or more railroad companies to enter into a joint tariff and make or adopt a joint rate for the transportation of property over the lines of said companies, and which assume to authorize said commission to make a division of joint earnings between two or more railroad companies, is not violative of the fourteenth amendment to the Constitution of the United States, in this:

It denies to this defendant the right to contract in reference to its own business, and thus takes its property without its consent.

It compels this defendant to enter into involuntary, unreasonable, and unprofitable contracts with other carriers, at the instance of third parties, resulting in a loss of business and revenue on the part of the defendant.

It requires this defendant to enter into involuntary contracts with other carriers.

It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed.

It requires this defendant to hire and use the cars and ve-
f hicles of other carriers in the transportation of traffic upon its own line.

It deprives this defendant of the right to make its own contracts with other carriers, and delegates to a non-judicial body the right to fix and determine the proportion of a joint through rate which shall be paid to the defendant, thereby depriving this defendant of its property, the right to use the same, and the right to contract in relation thereto.

It denies to this defendant the equal protection of the laws, which protect and insure to all citizens the right to contract in relation to their property, and deprives the defendant of its property without due process of law.

It abridges the privileges and immunities of this defendant as a citizen of the United States by depriving it of the right to control, conduct, and manage its own business.

It was also adjudged by said supreme court by its final judgment in said suit that said acts of the legislature of said State and said laws of said State did not abridge the privileges or immunities of said The Minneapolis and St. Louis Railroad Company, defendant in said suit, nor deny to it the equal protection of the laws, nor deprive it of its property without due compensation or due process of law, contrary to the provisions of the fourteenth amendment to the Constitution of the United States, and that said acts of the legislature of said State and the said laws of said State do not violative or contravene the provisions of the fourteenth amendment to the Constitution of the United States in either or any of the following conditions:

In authorizing the State of Minnesota, acting through its railroad and warehouse commission, to establish rates which discriminate in favor of all dealers in and the consumers of hard coal at certain towns and stations within said State, as against other dealers and consumers, citizens of said State, and to discriminate in the rates established for one carrier as compared with the rates allowed other carriers in the same State for like service.

In authorizing the State of Minnesota, acting through its railroad and warehouse commission, to compel said The Minneapolis and
g St. Louis Railroad Company to enter into a joint rate, and to make and perform an agreement with another carrier for the transportation of property over the lines of both companies.

In authorizing the State of Minnesota, acting through its railroad and warehouse commission, to compel two or more connecting carriers to transport shipments passing over two or more lines for a less or different rate or tariff than the sum of the different local rates or tariffs of the several carriers.

In authorizing the State of Minnesota, acting through its railroad and warehouse commission, to declare and determine the manner and proportion in which money earned by two or more carriers in transporting merchandise over two or more connecting lines shall be divided between the several carriers.

In authorizing the State of Minnesota, acting through its railroad and warehouse commission, to compel a railroad carrier to trans-

port traffic originating upon the line of another railroad, designated by the railroad and warehouse commission, at a different and less rate than it may lawfully collect and receive for the same service when the traffic originates upon its own line, thereby forcing the carrier to discriminate in favor of certain traffic and certain localities.

In authorizing the State of Minnesota, acting through its railroad and warehouse commission, to compel a railroad carrier to charge and collect different rates per ton per mile for the transportation of traffic originating upon certain other railroads from that collected for traffic local to its own railroad, notwithstanding the service rendered is identical.

Wherefore said The Minneapolis and St. Louis Railroad Company, defendant in said suit, prays for the allowance of a writ of error, and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

ALBERT E. CLARKE,
Attorney for the Minneapolis and St. Louis Railroad Company, Defendant.

Allowed.
CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

St. Paul, Minn., July 3rd, 1900.

h [Endorsed:] Copy. State of ——, county of ——. U. S. Supreme Court. The Minneapolis and St. Louis Railroad Co., plaintiff in error, *vs.* State of Minnesota *ex rel.* Railroad & Warehouse Com., defendant in error. Petition for writ of error.

i *Assignment of Errors Made and Filed by Defendant and Appellant in the State Supreme Court.*

The court erred:

1. In ruling and deciding that the appellant had not proved by a preponderance of the evidence that the portion of the joint through rate designated and set apart by the railroad and warehouse commission as compensation for the service rendered by appellant and its connecting carriers, the Wisconsin, Minnesota & Pacific Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company, in the transportation of hard coal in car-loads from Duluth to points named in Schedule "A" of said order, is inadequate, insufficient, and not compensatory, and is not a just and fair compensation for such service.

2. In holding and deciding that the order of the railroad and warehouse commission by which it required this appellant to transport hard coal in car-loads from Minneapolis to the several stations named in said order for a compensation and at a rate less than the cost and true value of the services rendered is not violative of the fourteenth amendment to the Constitution of the United States,

which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. In holding that the order of the railroad and warehouse commission by which this appellant is required to transport hard coal in car loads at a rate and price per ton fixed by said order, which rate or price is less than the actual cost and expense incurred by appellant in rendering said service, and is unjust, inadequate, and not compensatory, is not violative of section 10 of article 1 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

4. In holding that the law enacted by the legislature of the State of Minnesota, embodied in chapter 91, General Laws of 1895, and particularly in subdivisions B, C, and D of section three of said chapter, and any and all laws of said State which assume to confer upon the railroad and warehouse commission the power and authority to compel two or more railroad companies to enter into a joint tariff and make or adopt a joint rate for the transportation of property over the lines of said companies, and which assume to authorize said commission to make a division of joint earnings between two or more railroad companies, is not violative of the fourteenth amendment to the Constitution of the United States, in this:

It denies to this defendant the right to contract in reference to its own business, and thus takes its property without its consent.

It compels this defendant to enter into involuntary, unreasonable, and unprofitable contracts with other carriers, at the instance of third parties, resulting in a loss of business and revenue on the part of the defendant.

It requires this defendant to enter into involuntary contracts with other carriers.

It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed.

It requires this defendant to hire and use the cars and vehicles of other carriers in the transportation of traffic upon its own line.

It deprives this defendant of the right to make its own contracts with other carriers, and delegates to a non-judicial body the right to fix and determine the proportion of a joint through rate which shall be paid to the defendant, thereby depriving this defendant of its property, the right to use the same, and the right to contract in relation thereto.

It denies to this defendant the equal protection of the laws, which protect and insure to all citizens the right to contract in relation to their property, and deprives the defendant of its property without due process of law.

It abridges the privileges and immunities of this defendant as a citizen of the United States by depriving it of the right to control, conduct, and manage its own business.

5. In holding that the rate established by the order of the railroad and warehouse commisson does not discriminate in favor of all dealers in and consumers of hard coal at the points covered by

the order, as against other deal-s and consumers, citizens of
k this State, and discriminates against the appellant as compared with the rates allowed other carriers for like service.

6. In holding that the State of Minnesota, acting through the railroad and warehouse commission, has the right, power, and authority to compel the appellant to enter into a joint rate, or make and perform an agreement with another carrier for the transportation of property over the lines of both companies.

7. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law by which two or more connecting carriers may be compelled to transport shipments passing over two or more lines for a less or different rate or tariff than the sum of the reasonable local rates or tariffs of the several carriers.

8. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law which declares and determines the manner and proportion in which money earned by two or more carriers in transporting merchandise over two or more connecting lines shall be divided between the several carriers.

9. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law whereby a railroad carrier may be compelled to transport traffic originating upon the line of another railroad designated by the railroad and warehouse commission, at a different and less rate than it may lawfully collect and receive for the same service where the traffic originates upon its own line, thereby forcing defendant to give a preference and discriminate in favor of certain traffic and certain localities.

10. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law whereby a railroad carrier may be compelled to charge and collect different rates per ton per mile for traffic originating upon other railroads from that collected for traffic local to its own railroad, notwithstanding the service rendered is identical.

l STATE OF MINNESOTA, *ss:*

Supreme Court.

I, D. F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify that the above and foregoing assignment of errors was made and filed by defendant and appellant in the above-entitled action of State of Minnesota *ex rel.* Railroad and Warehouse Commission, respondent, *v.* The Minneapolis and St. Louis Railroad Company and The St. Paul and Duluth Railroad Company, appellants. Said assignment of errors was filed in said supreme court on the 3rd day of April, 1900, in accordance with the rules and practice of said court, and became and constituted a part of the record upon which said cause was heard, tried, and determined and upon which the same was argued and submitted in said court.

In witness whereof I have hereunto set my hand and affixed the

seal of the supreme court of the State of Minnesota, at the capital, St. Paul, Minnesota, this 26th day of July, 1900.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of Minnesota,
By J. L. HELM, *Deputy.*

m [Endorsed:] Copy. State of ——, county of ——, —— court. The Mpls. & St. Louis R. R. Co., plaintiff in error, *vs.* State of Minn. *ex rel.* Railroad & Warehouse Comm'n, defendant in error. Assignments of error filed in State supreme court.

n In the Supreme Court of the United States.

THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, Plaintiff in Error,
vs.
STATE OF MINNESOTA *ex Rel.* RAILROAD AND WAREHOUSE COMMISSION, Defendant in Error.

Assignment of Errors.

The plaintiff in error respectfully submits that the supreme court of Minnesota erred in this:

1. In holding and deciding that the order of the railroad and warehouse commission by which it required this plaintiff in error to transport hard coal in car-loads from Minneapolis to the several stations named in said order for a compensation and at a rate less than the cost and true value of the services rendered is not violative of the fourteenth amendment to the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. In holding that the order of the railroad and warehouse commission by which this appellant is required to transport hard coal in car-loads at a rate and price per ton fixed by said order, which rate or price is less than the actual cost and expense incurred by plaintiff in error in rendering said service, and is unjust, inadequate, and not compensatory, is not violative of section 10 of article 1 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

3. In holding that the law enacted by the legislature of the State of Minnesota, embodied in chapter 91 of the General Laws of 1895, by which the railroad and warehouse commission of said State is authorized to compel two or more railroad companies to enter into a joint tariff and make and adopt a joint rate for the transportation of property over the lines of said companies, and which assumes to authorize said commission to make a division of the joint earn-

o ings of two or more railroad companies, and to apportion such earnings, is not violative of the fourteenth amendment to the Constitution of the United States, in this:

It denies to the plaintiff in error the right to contract in reference to its own business, and thus takes its property without its consent.

It compels the plaintiff in error to enter into involuntary, unreasonable, and unprofitable contracts with other carriers at the instance of third parties, resulting in a loss of business and revenue on the part of the plaintiff in error.

It requires the plaintiff in error to enter into involuntary contracts with other carriers.

It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed.

It requires the plaintiff in error to hire and use the cars and vehicles of other carriers in the transportation of traffic upon its own line.

It deprives the plaintiff in error of the right to make its own contracts with other carriers and delegates to a non-judicial body the right to fix and determine the proportion of a joint through rate which shall be paid to the plaintiff in error, thereby depriving the plaintiff in error of its property, the right to use the same, and the right to contract in relation thereto.

It denies to the plaintiff in error the equal protection of the laws, which protect and insure to all citizens the right to contract in relation to their property, and deprives the plaintiff in error of its property without due process of law.

It abridges the privileges and immunities of the plaintiff in error as a citizen of the United States by depriving it of the right to control, conduct, and manage its own business.

4. In holding that the law of the State of Minnesota, by which it is held that in estimating and computing the cost of operating a railway per ton of freight per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates, it is error to take into consideration any part of the earnings applied to the payment of dividends upon the capital stock of such railway, does not violate the fourteenth amendment of the Constitution of the United States, in this:

The enforcement of such law deprives the company or corporation operating such railway of the right to earn or pay any dividend whatever on its capital stock, or to derive any income or return from the use and operation of its property, and enables the State, acting through the railroad and warehouse commission, to make and enforce a tariff which will not permit the carrier to earn any sum in excess of actual cost of operation, and will compel such carrier to devote its property to the public use without compensation, whereby it is deprive- of its property without due process of law and is denied the equal protection of the laws.

5. In holding that the State law, which under the guise of a so-called "commercial necessity" assumes to compel railway carriers to transport freight over their lines of railway for a rate less than the actual cost of such service, does not violate the fourteenth amendment to the Federal Constitution by depriving such carrier of their property without due process of law and by denying the equal protection of the laws, which ensure to all citizens the right to earn and

receive a reasonable compensation for service rendered and a reasonable profit over and above the actual reasonable cost of such service.

6. In holding that the law of the State of Minnesota which authorizes all other citizens of said State to contract for, collect, and receive a profit or dividend equal to six per cent. upon the capital invested and denies to railway carriers the right to earn, collect, and receive a dividend or interest charge not exceeding six per cent. upon its actual and necessary capitalization does not violate the fourteenth amendment to the Constitution of the United States by depriving such railway carriers of their property without due process of law and by denying them the equal protection of the laws.

7. In holding that the State of Minnesota, acting through the railroad and warehouse commission, has the right, power, and authority to compel the plaintiff in error to enter into a joint rate or make and perform an agreement with another carrier for the transportation of property over the lines of both companies.

9 8. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law by which two or more connecting carriers may be compelled to transport shipments passing over two or more lines for a less or different rate or tariff than the sum of the reasonable local rates or tariffs of the several carriers.

9. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law which declares and determines the manner and proportion in which money earned by two or more carriers in transporting merchandise over two or more connecting lines shall be divided between the several carriers.

10. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law whereby a railroad carrier may be compelled to transport traffic originating upon the line of another railroad designated by the railroad and warehouse commission at a different and less rate than it may lawfully collect and receive for the same service where the traffic originates upon its own line, thereby forcing defendant to give a preference and discriminate in favor of certain traffic and certain localities.

11. In holding that the State of Minnesota has the right, power, or authority to make and enforce a law whereby a railroad carrier may be compelled to charge and collect different rates per ton per mile for traffic originating upon other railroads from that collected for traffic local to its own railroad, notwithstanding the service rendered is identical.

12. In holding that the evidence does not show conclusively that the cost of the service required by the State, through its railroad and warehouse commission, is not greater than the revenue to be derived from the proportion of the joint rate awarded to the plaintiff in error.

13. In holding that in order to show that the rate fixed by the railroad and warehouse commission is unreasonable the plaintiff in error is bound to show the exact cost of transporting each particular commodity, and that such fact is not established by proof

that the cost per ton per mile of transporting all merchandise is more than the rate per ton per mile fixed by the order of the commission.

r 14. In holding that there was not competent and sufficient evidence of the capitalization, cost, and value of the railroad of the plaintiff in error.

s Supreme Court of the United States, *ss:*

STATE OF MINNESOTA *ex Rel.* RAILROAD AND WAREHOUSE COMMISSION, Plaintiff,
vs.
THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, Defendant.

Know all men by these presents that we, the Minneapolis and St. Louis Railroad Company, as principal, and the National Surety Company, a corporation, as surety, are held and firmly bound unto the Railroad and Warehouse Commission in the sum of one thousand ($1,000.00) dollars, to be paid to the said Railroad and Warehouse Commission; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 23d day of June, A. D. 1900.

Whereas the above-named The Minneapolis and St. Louis Railroad Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named The Minneapolis and St. Louis Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY,
By T. F. DAY, *Vice-Pres't.*

Attest: JOS. GASKELL, *Secretary.*

NATIONAL SURETY COMPANY, [SEAL.]
By F. A. CHAMBERLAIN, *Res't Vice-President.*

Attest: AL. J. SMITH,
[CORPORATE SEAL.] *Res't Ass't Secretary.*

Signed, sealed, and delivered in presence of—
W. W. COLE.
M. C. BROWN.
J. J. HARPER.
C. E. SWAN.

t STATE OF MINNESOTA, } *ss:*
County of Hennepin, }

On this 2nd day of July, 1900, before me personally appeared Al. J. Smith, resident assistant secretary of the National Surety Com-

pany, the above-named corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he is resident assistant secretary of said corporation, the National Surety Company; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal; that it was affixed by order of the board of directors of said corporation; that the internal-revenue stamps affixed to said instrument, exclusive of the fifty-cent stamp affixed thereto and canceled by the principal in said instrument named, *is* equal in amount to one-half of one per cent. on each dollar or fractional part thereof of the amount of premium charged by said corporation as the surety on said instrument, and that he signed said instrument as resident assistant secretary of said corporation by like authority; and the said Al. J. Smith further said that he is acquainted with F. A. Chamberlain and knows him to be resident vice-president of said company; that the signature of said F. A. Chamberlain subscribed to the said instrument is the genuine handwriting of the said F. A. Chamberlain and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Al. J. Smith, resident assistant secretary; and the said Al. J. Smith acknowledged said instrument to be the free act and deed of said corporation.

JOHN J. HARPER,
[NOTARIAL SEAL.] *Notary Public, Hennepin County, Minnesota.*

u [Endorsed:] Copy. State of ——, county of ——. U. S. Supreme Court. The Minneapolis and St. Louis Railroad Company, plaintiff in error, *vs.* State of Minnesota *ex rel.* Railroad & Warehouse Com., defendant in error. Bond. I hereby approve the within bond and sureties this 3rd day of July, 1900. Chas. M. Start, chief justice supreme court of Minnesota.

1 STATE OF MINNESOTA:

Supreme Court, April Term, 1900.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF MINNESOTA *ex Rel.* RAILROAD AND WAREHOUSE COMMISSION, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY and THE ST. PAUL & DULUTH RAILROAD COMPANY, Defendants.

Petition for Alternative Writ of Mandamus.

To the honorable the district court of Ramsey county, Minnesota:

The petition of the Railroad and Warehouse Commission by W. B. Douglas, attorney general of the State of Minnesota, respectfully states and shows:

That George L. Becker, Ira B. Mills and Peter M. Ringdal,
2 are the duly appointed, qualified and acting railroad and warehouse commissioners of the State of Minnesota, and as such constitute the railroad and warehouse commission of such State;

That A. K. Teisberg is the duly appointed, qualified and acting *secretary of such commission*;

That the St. Paul & Duluth Railroad Company is a railroad corporation and common carrier of freight and passengers for hire, duly created, organized and existing under — by virtue of the laws of the State of Minnesota, and engaged in operating a railroad in said State of Minnesota, the main line of which extends from the city of Duluth in the county of St. Louis, Minnesota, to the cities of St. Paul in Ramsey county, and of Minneapolis in Hennepin county, in said State;

That the Minneapolis & St. Louis Railroad Company is a railroad corporation and common carrier of freight and passengers for hire, duly created, organized and existing under and by virtue of the laws of the State of Minnesota, and engaged in operating a railroad in said State of Minnesota, one of its said lines of road extending from said cities of St. Paul and Minneapolis through the counties of Ramsey, Hennepin, Carver, Scott, Le Sueur, Waseca, and Freeborn, to Boyd in said county of Freeborn;

That from said main line, branch lines of road extend through various other counties of said State, one of said lines extending to the town of Winthrop in Blue Earth county in said State;

That the Minneapolis, New Ulm & Southwestern Railroad Company is a railroad corporation and common carrier of freight and passengers for hire, created, organized and existing under and by virtue of the laws of the State of Minnesota, and the owner of
3 the road extending from said town of Winthrop to the city of New Ulm in Brown county, Minnesota;

That the defendant, The Minneapolis & St. Louis Railroad Company, is the owner of all of the capital stock of said Minneapolis, New Ulm & Southwestern Railroad Company, and is in the active management and control of and actually operates said railroad from said Winthrop to New Ulm;

That said companies are and have been for all the times herein stated, common carriers of passengers and freight and engaged in doing a freight business over said lines of road, and under traffic agreements with each other have been engaged in carrying various kinds of freight particularly hard coal, from said city of Duluth to the points above described on said Minneapolis & St. Louis railroad and said Minneapolis, New Ulm & Southwestern railroad, as well as all intermediate points on said two last-mentioned railroads, for a joint through rate established as hereinbefore stated by an agreement between said St. Paul & Duluth Railroad Company and said Minneapolis & St. Louis Railroad Company;

That said defendant companies and each of them have full and ample means and facilities for the carrying on of said freight business, including rolling stock, as well as complete terminals at term-

inal points, and track connections and yards at all connecting points; and are fully able to and for a long time past have been engaged in making such freight shipments in car-load lots without any change of cars, and are fully equipped and prepared and able to accept shipments of the character above described, and for a long time past and

4 *until the fixing of the rates therefor by said* railroad and warehouse commission, as hereinafter alleged, said defendant companies did receive such freight and make such hauls and shipments and had established therefor rates which were known and published as joint through rates;

That amongst other rates agreed upon by said companies, a joint through rate for hard coal in car-load lots had been established and agreed upon, from said city of Duluth to each and every point upon the line of said Minneapolis & St. Louis Company and upon the line of said Minneapolis, New Ulm & Southwestern Railroad Company, in said State of Minnesota, which said joint rate it was the practice of said defendant companies to divide between them in such proportion as they had theretofore agreed upon. And each of said defendant companies during all of said times was and still is fully equipped and competent and able to carry said coal and accept all shipments thereof, and do and perform all of the things necessary in and about the receiving, hauling and delivering of said coal, as the same might be demanded and as public necessity might require. And for more than one year prior to the making of the order hereinafter mentioned had been engaged in and had carried large quantities of hard coal between said points at and for said through rate;

That on the 22nd day of September, 1898, the railroad and warehouse commission of the State of Minnesota by a resolution duly passed and adopted by said commission, adjudged and determined that said commission should investigate the joint through rate charges by said defendant companies as freight for hard coal in car-load lots from said city of Duluth to said city of New Ulm, a copy of which said order or resolution is hereto attached, marked Exhibit "A;"

5 That said Exhibit "A" was duly served upon each of said defendants, and thereafter and within twenty days after the service thereof, said defendants duly appeared in said proceedings before said commission and duly submitted their respective answers, in which the claims of said defendant railroad companies were set forth as to a proper and reasonable joint through rate upon said coal shipments;

That thereafter said matter came on duly to be heard before said railroad and warehouse commission and said commission having duly heard and considered all of the evidence produced upon said matter, and having duly considered the same, did thereafter and on the 19th day of January, 1899, duly make and enter its order and decision wherein and whereby it was determined what was a reasonable and fair joint through rate over said lines of road, from said city of Duluth to the various points upon the lines of said Minneapolis & St. Louis railroad and upon the line of said Minneapolis, New

Ulm & Southwestern railroad, mentioned in said order; a copy of which said order is hereto attached and marked Exhibit "B;"

That in the proceedings to determine said reasonable joint through rates hereinbefore described, said railroad and warehouse commission had full jurisdiction of the matters to be determined, and the matters determined in and by said order and decision, and full jurisdiction of the defendant railroad companies, and all of said proceedings were duly and legally conducted, of all of which said defendant companies had full and due notice and knowledge;

That said order, "Exhibit B" was duly served upon each of the defendants on the 19th day of January, 1889; that more than
6 thirty days have elapsed since the making and service of said order and no appeal has been taken by either of said defendant companies from said order. And thereafter and on the 23rd day of February, 1899, said railroad and warehouse commission duly made and entered its order promulgating the said order, Exhibit "B," and duly caused such order of promulgation to be published and the same was on the 8th day of March, 1899, published in the New Ulm Review, a weekly newspaper printed and published in New Ulm, Brown county, Minnesota, that being one of the stations or points named in said order, the rate to which had been fixed and determined by said order. That said New Ulm Review was and is a weekly newspaper of general circulation in said Brown county, published in the English language, and had been so published and circulated for more than one year prior to the publication of said order, and the publication in said New Ulm Review was full, due and legal publication and promulgation of said order hereinbefore mentioned; and was the publication thereof ordered and directed by said commission;

That thereafter it being duly made to appear to said railroad and warehouse commission that said railroad companies were unable to and had failed to agree upon a proper division between themselves of the joint through rate so established by said order, Exhibit "B," such proceedings were had that said defendant companies were duly cited to be and appear before said commission on the 23rd day of March, 1899, at ten o'clock in the forenoon of that day, at the office of said commission in the city of St. Paul, Minnesota, and were at the same time duly notified that if they failed to agree on such division of such joint through rate on or before said 23rd day
7 of March, 1899, that said railroad and warehouse commission would at said time and place proceed to consider and determine in what proportion such division should be made between said defendant companies;

That pursuant to said notice and citation said defendant companies duly appeared before said commission at said time and place, and it appearing that no division of said rates had been agreed upon between said railroad companies, said railroad and warehouse commission duly proceeded to hear all the evidence produced upon said matter, and having duly considered the same and the value of the terminal facilities of said defendant companies and all the circumstances of the haul, thereafter and on the 8th day of April, 1899, duly

made and entered their order and determination upon said division, a copy of which is hereto annexed and marked Exhibit "C"; which said order was thereafter and on the 10th day of April, 1899, duly served upon each of said defendant companies. That more than thirty days have elapsed since the service of said order Exhibit "C" on said defendant companies, and no appeal has been in any manner taken therefrom by either of said defendant companies, and the same is now in full force and effect;

That thereafter and on the 10th day of April, 1899, said railroad and warehouse commission again duly promulgated the order made by it fixing and establishing the joint through rates hereinbefore described, to wit, Exhibit "B," and duly caused such schedule of rates together with said order of promulgation to be duly published in said New Ulm Review, and the same was so published in said New Ulm Review on the 12th day of April, 1899. That a copy of said last-mentioned order is hereto attached, marked Exhibit "D";

8 That the orders and judgments of said railroad and warehouse commission herein referred to are all in full force and effect and were each and all duly made and entered in the course of said proceedings as said railroad and warehouse commission had full authority, jurisdiction and right to do. That no appeal has been taken from any of said orders, nor have any proceedings whatever been instituted to stay the operation of the same, and each of said orders is binding and conclusive upon each of said defendant companies herein.

That notwithstanding that fact said defendant railroad companies, their officers, agents and employés have failed, neglected and refused, and still fail, neglect and refuse to adopt the schedule of rates so fixed by said railroad and warehouse commission, or keep for public inspection schedules showing such rates; and have refused, failed and neglected to file with the railroad and warehouse commission copies of schedules of their classifications, rates, fares, and charges, for the hauling of hard coal in car-load lots in accordance with said determination. And said defendant, Minneapolis & St. Louis Railroad Company has refused and still continues to refuse to receive, haul and deliver hard coal in car-load lots at and for the proportion of said joint through rate so allowed, fixed and established by the order of said railroad and warehouse commission as its joint, reasonable and fair proportion of the joint through rate established by said commission as hereinbefore alleged; and has in all things neglected and refused and still continues to neglect and refuse to obey or carry out the orders of said railroad and warehouse commission made and entered in the proceedings hereinbefore set forth.

9 That there is no plain, speedy and adequate remedy in the course of law by which the petitioner herein can compel the defendants to obey the orders of said commission as contained in said Exhibit "B."

Wherefore, your petitioner prays that this honorable court make and enter its order directed to said defendant railroad companies, and each of them, commanding and directing that they forth-

with adopt and publish as provided by law the joint through rate on shipments of hard coal in car-load lots from the city of Duluth to the points in said State of Minnesota, named in said order, Exhibit "B," at the rate, sum and amount declared to be reasonable in said order, Exhibit "B;" and that from and after this time said defendant railroad companies, their officers, agents and servants, receive and carry and deliver hard coal in car-load lots from said city of Duluth to the points, stations and towns named in said order, Exhibit "B" at and for the price described and named in said order Exhibit "B," and that said defendant railroad companies, their and each of their officers, agents, employés and servants, refrain from asking, demanding or receiving any greater sum for such through shipments of hard coal in car-load lots from said city of Duluth to the points, stations and places named in said order, Exhibit "B," than the respective amounts specified therein as reasonable and just for such shipment, or to show cause before this court at a time
10 and place to be specified, if any there be, why such order should not be made, and for such other and further relief in the premises as may be just.

RAILROAD AND WAREHOUSE COMMISSION,
By IRA B. MILLS, *Chairman.*
W. B. DOUGLAS, *Attorney General.*

C. D. AND THOS. D. O'BRIEN, *Of Counsel.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Ira B. Mills, being duly sworn, on oath says that he is one of the railroad and warehouse commissioners of the State of Minnesota, and has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

IRA B. MILLS.

Subscribed and sworn to before me this 21st day of June, A. D. 1899.

THOS. YAPP,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

EXHIBIT "A."

STATE OF MINNESOTA:

Before the Railroad and Warehouse Commission.

In the matter of the reasonableness of the freight rate charged on hard coal from Duluth to New Ulm by the Chicago & North-
11 western and the Chicago, St. Paul, Minneapolis & Omaha Railroad Companies, and the St. Paul & Duluth and the Minneapolis & St. Louis and the Minneapolis, New Ulm & Southwestern Railroad Companies.

The railroad and warehouse commission of the State of Minnesota, having been advised by a resolution of the Commercial Union

of the City of New Ulm, in the county of Brown, that the rates on hard coal from the city of Duluth to said city of New Ulm via the Chicago & Northwestern and Chicago, St. Paul, Minneapolis & Omaha railroads and via the St. Paul & Duluth and Minneapolis & St. Louis and the Minneapolis, New Ulm & Southwestern Railroad Companies is $2.50 per ton, and that said Commercial Union deem that said rate is unreasonable and unjust and is twenty-five cents a ton more than the rate now established by the Chicago & Northwestern to the station of Traverse, a short distance east of said city of New Ulm, and the same as the village of Marshall, eighty miles west from the said city of New Ulm, on the Chicago & Northwestern road, and that the same rate is charged to New Ulm as to the village of Madison, a considerable distance further, and that $2.00 per ton would be a reasonable rate for the transportation of said coal;

And said commission having examined the joint tariffs on hard coal heretofore filed with said commission by said companies, and it appearing from such examination that the rates charged by them from Duluth to New Ulm are as stated by said Commercial Union and that the reasonableness of such rate is a proper subject for investigation by said commission;

And the resolution of said Commercial Union not being in
12 sufficient form to constitute a complaint under the statute in such case provided and not being verified as required by said statutes:

It is therefore resolved, by the railroad and warehouse commission that they proceed upon their own motion to investigate the reasonableness of the joint rate now charged by the Chicago & Northwestern and the Chicago, St. Paul, Minneapolis & Omaha Railroad Companies and the joint rate charged by the St. Paul & Duluth and the Minneapolis & St. Louis Railroad Companies from Duluth to the city of New Ulm on hard coal; and to that end it is ordered that copies of this resolution be served upon each of the railroad companies hereinbefore mentioned in the same manner as if complaint had been made in the usual form and that these resolutions shall stand in lieu of and serve for a complaint against said railroad companies.

And it is further ordered, that said railroad companies be and they are hereby notified that said commission have the reasonableness of said joint rate under consideration and that said companies be and they are hereby required to answer hereto within twenty days after the service thereof upon them as aforesaid, and that thereafter such proceedings be had thereon as upon complaint in such cases made and provided.

By order of the commission.

A. K. TEISBERG, *Secretary.*

Dated St. Paul, Minn., September 22nd, 1898.

13 EXHIBIT "B."

STATE OF MINNESOTA:

Before the Railroad and Warehouse Commission.

In the matter of the reasonableness of the freight charged on hard coal from Duluth to New Ulm by the Chicago & Northwestern and the Chicago, St. Paul, Minneapolis & Omaha Railroad Companies and the St. Paul & Duluth and the Minneapolis & St. Louis and the Minneapolis, New Ulm & Southwestern Railroad Companies.

In the above-entitled proceeding the commission find the following facts:

First. That the St. Paul & Duluth Railroad Company is a corporation organized under the laws of the State of Minnesota, and is operating a railroad between the city of Duluth, St. Louis county, Minnesota, to the cities of Minneapolis and St. Paul, Minnesota, and that said St. Paul and Duluth Railroad Company has track connections at Minneapolis, with the Minneapolis & St. Louis Railroad Company, a corporation organized under the laws of the State of Minnesota and operating a railroad from the cities of Minneapolis and St. Paul to Boyd in said State of Minnesota, passing through Winthrop.

Second. That the Minneapolis, New Ulm & Southwestern Railroad Company, is a corporation duly organized and existing under the laws of the State of Minnesota, and is the owner of a railroad from Winthrop in this State to New Ulm in this State; and that said company has track connections at Winthrop with the Minneapolis & St. Louis Railroad Company.

14 Third. All the allegations of fact contained in the resolution of this commission in the above-entitled matter September 22nd, 1898, are true.

Fourth. That on the 22nd day of September, A. D. 1898, the date of the commencement of these proceedings, the St. Paul & Duluth Railroad Company, Minneapolis & St. Louis Railroad Company, and the Minneapolis, New Ulm & Southwestern Railroad Company had made and still are maintaining to the stations hereinafter mentioned on the lines of the Minneapolis & St. Louis Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company, the rates hereinafter stated, viz:

SCHEDULE "A."

From Duluth to stations.	Rate per ton.
Hopkins	$1.75
Minnetonka	2.00
Deephaven	2.00
Excelsior	2.10
Waconia	2.35
Young America	2.45

	Norwood	2.50
	Hamburg	2.50
	Green Isle	2.50
	Arlington	2.50
	Gaylord	2.50
	Winthrop	2.50
	Lafayette	2.50
	Klossner	2.50
	New Ulm	2.50
	Gibbon	2.50
15	Fairfax	2.50
	Franklin	2.50
	Morton	2.50
	Redwood	2.50
	Delhi	2.50
	Belview	2.50
	Echo	2.50
	Wood Lake	2.50
	Hanley Falls	2.50
	Hazel Run	2.50
	Clarkfield	2.50
	Boyd	2.50

Fifth. That the rates named in Schedule "B" hereto annexed and hereby made a part of these findings on hard coal from Duluth to stations named in said schedule are just and reasonable and that any greater or higher rate is unreasonable.

It is therefore ordered, that the joint rate on hard coal from Duluth to stations named in said Schedule "A" now existing on the St. Paul & Duluth and the Minneapolis & St. Louis railroad and the Minneapolis, New Ulm & Southwestern Companies be reduced and fixed at the rate shown in said Schedule "B."

Dated this 19th day of January, A. D. 1899.

By the commission:

(Signed) A. K. TEISBERG, *Secretary.*

16 SCHEDULE "B."

From Duluth to stations.	Rate per ton.
Hopkins	$1.32
Minnetonka	1.35
Deephaven	1.38
Excelsior	1.40
Waconia	1.51
Young America	1.56
Norwood	1.57
Hamburg	1.62
Green Isle	1.63
Arlington	1.68
Gaylord	1.75
Winthrop	1.80
Lafayette	1.86

Klossner	1.91
New Ulm	1.95
Gibbon	1.87
Fairfax	1.96
Franklin	2.01
Morton	2.05
Redwood	2.11
Delhi	2.15
Belview	2.21
Echo	2.23
Wood Lake	2.29
Hanley Falls	2.33
Hazel Run	2.38
Clarkfield	2.42
Boyd	2.48

17

EXHIBIT "C."

STATE OF MINNESOTA:

Before the Railroad and Warehouse Commission.

In the matter of the reasonableness of the freight rate charged on hard coal from Duluth to New Ulm by the Chicago & Northwestern and the Chicago, St. Paul, Minneapolis & Omaha Railroad Companies and the St. Paul & Duluth and the Minneapolis & St. Louis and the Minneapolis, New Ulm & Southwestern Railroad Companies.

The railroad and warehouse commission of the State of Minnesota, having in the above-entitled proceeding on the 19th day of January, A. D. 1899, made an order fixing a joint rate on hard coal from Duluth, Minnesota, to the stations named in said order over the lines of the St. Paul & Duluth and the Minneapolis & St. Louis and Minneapolis, New Ulm & Southwestern Railroad Companies, which order was duly served upon each of the above-named companies on or before the 19th day of January, A. D. 1899, and the commission having been notified by the Minneapolis & St. Louis Railroad Company that said companies named in said order could not agree upon the division of the rates so made by the commission, and the commission having on the 4th day of March, A. D. 1899, made an order requiring the said companies to agree upon a division of the joint rates so fixed by the commission and to notify the commission in writing if they had so agreed on or before the 23rd of March, 1899, at 10 o'clock in the forenoon of that day, and if they

18 failed to so agree or failed to notify the commission of such agreement, the commission would on said date at its office in St. Paul proceed to decide and determine what was a just and proper division of said joint rates and notify said carriers to attend at said time and place and produce such evidence as they desired as to the amount or proportion of such joint rates that each interested party should receive.

On the said 23rd day of March, at the time and place named in said order, the Minneapolis & St. Louis Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company appeared by Thomas Wilson, attorney, who represented Mr. A. E. Clark, the attorney for the Minneapolis & St. Louis Railroad Company, and the St. Paul & Duluth Railroad Company appeared by Emerson Hadley, its attorney, and upon the request of the attorney for the Minneapolis & St. Louis Railroad Company and with the consent of all parties to this proceeding, the hearing on said order was continued until the 27th day of March, 1899, at the office of the commission in St. Paul, and upon said last-named date the commission proceeded to hear the evidence in the matter under consideration, and it appearing by the evidence that said railroad companies were still unable to agree, and that the Minneapolis & St. Louis Railroad Company is the owner and operates the Minneapolis, New Ulm & Southwestern Railroad Company, and after taking into consideration all the evidence offered and the value of the terminal facilities and all the circumstances of the haul, the commission find that a reasonable and proper division of the rates so made by the commission is that the St. Paul & Duluth Railroad Company should be allowed one
19 dollar of the said rate and the balance of said rate should go to the Minneapolis & St. Louis Railroad Company.

That the arrangement for interchange and the compensation or mileage for the use of cars as it existed under the joint tariff heretofore existing between said railroad companies is found to be reasonable and ordered continued under the joint rates established by the order of the Commission.

Dated April 8th, 1899.

By the commission:

(Signed) A. K. TLISBERG, *Secretary.*

EXHIBIT "D."

STATE OF MINNESOTA:

Before the Railroad and Warehouse Commission.

In the matter of the reasonableness of the freight rate on hard coal from Duluth to New Ulm by the Chicago & Northwestern and Chicago, St. Paul, Minneapolis & Omaha Railroad Companies and the St. Paul & Duluth and Minneapolis & St. Louis and the Minneapolis, New Ulm & Southwestern Railroad Companies.

Whereas, in the above-entitled proceedings after a hearing duly had, the railroad and warehouse commission of the State of Minnesota by order dated the 19th day of January, A. D. 1899, declared the joint rates and charges hereinafter named to be equal and reasonable joint rates over the lines of the St. Paul & Duluth and the Minneapolis & St. Louis and Minneapolis, New Ulm & South-
20 western railroads on hard coal from Duluth to the stations hereinafter designated, viz:

From Duluth to stations.	Rate per ton.
Hopkins	$1.32
Minnetonka	1.35
Deephaven	1.38
Excelsior	1.40
Waconia	1.51
Young America	1.56
Norwood	1.57
Hamburg	1.62
Green Isle	1.63
Arlington	1.68
Gaylord	1.75
Winthrop	1.80
Lafayette	1.86
Klossner	1.91
New Ulm	1.95
Gibbon	1.87
Fairfax	1.96
Franklin	2.01
Morton	2.05
Redwood	2.11
Delhi	2.15
Belview	2.21
Echo	2.23
Wood Lake	2.29
Hanley Falls	2.33
Hazel Run	2.38
Clarkfield	2.42
Boyd	2.48

21 and ordered that the rates on hard coal from Duluth to said named stations be reduced and fixed at the amounts named; and whereas, said order was duly served on each of said railroad companies and more than thirty (30) days have expired since such service and no appeal has been taken from said order and the said roadroad companies have failed and neglected to adopt the rates and charges fixed by said order;

And whereas, the commission by an order dated April 8, 1899, fixed the division of the said rates between said railroad companies, and said rates are now in full force and effect after the publication of this order and it is unlawful for said railroad companies to charge any greater rate for the transportation of hard coal from Duluth to the stations above named than the rates above named;

It is therefore ordered, that the rates and charges fixed by the commission be published by a publication of this order for one week in the New Ulm Review, a weekly newspaper printed and published in New Ulm, Brown county, Minnesota.

Dated St. Paul, Minnesota, this 10th day of April, 1899.

By order of the commission:

A. K. TEISBERG, *Secretary.*

(Title of Cause.)

Alternative Writ of Mandamus.

The State of Minnesota to The Minneapolis & St. Louis Railroad Company and The St. Paul & Duluth Railroad Company, the defendants above named, Greeting:

22

Whereas, it manifestly appears to us by the petition of the railroad and warehouse commission of the State of Minnesota,

That George L. Becker, Ira B. Mills, and Peter M. Ringdahl are the duly-appointed, qualified, and acting railroad and warehouse commissioners of the State of Minnesota, and as such constitute the railroad and warehouse commission of said State;

That A. K. Teisberg is the duly appointed, qualified, and acting secretary of such commission;

That the St. Paul & Duluth Railroad Company is a railroad corporation and common carrier of freight and passengers for hire, duly created, organized, and existing under and by virtue of the laws of the State of Minnesota, and engaged in operating a railroad in said State of Minnesota, the main line of which extends from the city of Duluth, in the county of St. Louis, Minnesota, to the cities of St. Paul, in Ramsey county, and of Minneapolis, in Hennepin county, in said State;

That the Minneapolis & St. Louis Railroad Company is a railroad corporation and common carrier of freight and passengers for hire, duly created, organized, and existing under and by virtue of the laws of the State of Minnesota, and engaged in operating a railroad in said State of Minnesota, one of its said lines of road extending from said cities of St. Paul and Minneapolis through the counties of Ramsey, Hennepin, Carver, Scott, Le Sueur, Waseca, and Freeborn, to Boyd, in said county of Freeborn;

That from said main line branch lines of road extend through various other counties of said State, one of said lines extend-

23

ing to the town of Winthrop, in Blue Earth county, in said State;

That the Minneapolis, New Ulm & Southwestern Railroad Company is a railroad corporation and common carrier of freight and passengers for hire, created, organized and existing under and by virtue of the laws of the State of Minnesota, and the owner of the road extending from said town of Winthrop to the city of New Ulm, in Brown county, Minnesota;

The defendant, The Minneapolis & St. Louis Railroad Company, is the owner of all the capital stock of said Minneapolis, New Ulm & Suthwestern Railroad Company and is in the active management and control of and actually operates said railroad from said Winthrop to New Ulm;

That said companies are, and have been for all the times herein stated, common carriers of passengers and freight and engaged in doing a freight business over said lines of road, and under traffic agreements with each other, have been engaged in carrying various

kinds of freight, particularly hard coal, from said city of Duluth to the points above described on said Minneapolis & St. Louis railroad and said Minneapolis, New Ulm & Southwestern railroad, as well as all intermediate points on said two last-mentioned railroads for a joint through rate established as hereinbefore stated by an agreement between said St. Paul & Duluth Railroad Company and said Minneapolis & St. Louis Railroad Company;

That said defendant companies and each of them have full and ample means and facilities for the carrying on of said freight business, including rolling stock, as well as complete terminals at terminal points, and track connections and yards at all connecting
24 points; and are fully able to and for a long time past have been engaged in making such freight shipments in car-load lots without any change of cars, and are fully prepared and equipped and able to accept shipments of the character above described, and for a long time past and until the fixing of the rates therefor by said railroad and warehouse commission, as hereinafter stated, said defendant companies did receive such freight and make such hauls and shipments and had established therefor rates which were known and published as joint through rates;

That amongst other rates agreed upon by said companies, a joint through rate for hard coal in car-load lots had been established and agreed upon from said city of Duluth to each and every point upon the line of said Minneapolis & St. Louis railroad and upon the line of said Minneapolis, New Ulm & Southwestern railroad in said State of Minnesota; which said joint rate it was the practice of said defendant companies to divide between them in such proportion as they had theretofore agreed upon. And each of said defendant companies during all of said times was and still is fully equipped and competent and able to carry said coal and accept all shipments thereof and do and perform all of the things necessary in and about the receiving, hauling and delivering of said coal as the same might be demanded and as public necessity might require.

That on the 22nd day of September, 1898, the railroad and warehouse commission of the State of Minnesota, by a resolution duly passed and adopted by said commission, adjudged and determined that said commission should investigate the joint through rate charged by said defendant companies as freight for hard coal
25 in car-load lots from said city of Duluth to said city of New Ulm, which said resolution was duly served upon each of said defendant companies, and thereafter and within twenty days after the service thereof said defendant companies duly appeared in said proceedings before said commission and duly submitted their respective answers, in which the claims of said defendant companies were set forth with reference to the matter so to be investigated and determined by said commission;

That thereafter said matter came on duly to be heard before said railroad and warehouse commission, and said commission having duly heard and considered all of the evidence produced upon said matter, and having duly considered the same, did thereafter and on the 19th day of January, 1899, duly make and enter its order

wherein and whereby it was determined what was a reasonable and fair joint through rate over said lines of road from said city of Duluth to the various points upon the lines of said Minneapolis & St. Louis railroad and said Minneapolis, New Ulm & Southwestern railroad, mentioned in said order, which said order was in the words and figures following, to wit:

"STATE OF MINNESOTA:

Before the Railroad and Warehouse Commission.

In the matter of the reasonableness of the freight charges on hard coal from Duluth to New Ulm by the Chicago & Northwestern and the Chicago, St. Paul, Minneapolis & Omaha Railroad Companies and the St. Paul & Duluth and the Minneapolis & St. Louis and the Minneapolis, New Ulm & Southwestern Railroad Companies.

26 In the above-entitled proceeding the commission find the following facts:

First. That the St. Paul & Duluth Railroad Company is a corporation organized under the laws of the State of Minnesota, and is operating a railroad between the city of Duluth, St. Louis county, Minnesota, to the cities of Minneapolis and St. Paul, Minnesota, and that said St. Paul & Duluth Railroad Company has track connections at Minneapolis with the Minneapolis & St. Louis Railroad Company, a corporation organized under the laws of the State of Minnesota and operating a railroad from the cities of Minneapolis and St. Paul to Boyd, in said State of Minnesota, passing through Winthrop.

Second. That the Minneapolis, New Ulm & Southwestern Railroad Company is a corporation duly organized and existing under the laws of the State of Minnesota and is the owner of a railroad from Winthrop, in this State, to New Ulm, in this State; and that said company has track connections at Winthrop with the Minneapolis & St. Louis Railroad Company.

Third. All the allegations of fact contained in the resolution of this commission in the above-entitled matter September 22nd, 1898, are true.

Fourth. That on the 22nd day of September, A. D. 1898, the date of the commencement of these proceedings, the St. Paul & Duluth Railroad Company, Minneapolis & St. Louis Railroad Company, and the Minneapolis, New Ulm & Southwestern Railroad Company had made and still are maintaining to the stations hereinafter mentioned on the lines of the Minneapolis & St. Louis Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company, the rates hereinafter stated, viz:

27

SCHEDULE "A."

From Duluth to stations.	Rate per ton
Hopkins	$1.75
Minnetonka	2.00
Deephaven	2.00
Excelsior	2.10
Waconia	2.35
Young America	2.45
Norwood	2.50
Hamburg	2.50
Green Isle	2.50
Arlington	2.50
Gaylord	2.50
Winthrop	2.50
Lafayette	2.50
Klossner	2.50
New Ulm	2.50
Gibbon	2.50
Fairfax	2.50
Franklin	2.50
Morton	2.50
Redwood	2.50
Delhi	2.50
Belview	2.50
Echo	2.50
Wood Lake	2.50
Hanley Falls	2.50
Hazel Run	2.50
Clarkfield	2.50
Boyd	2.50

28 Fifth. That the rates named in Schedule "B" hereto annexed and hereby made a part of these findings on hard coal from Duluth to stations named in said schedule are just and reasonable and that any greater or higher rate is unreasonable.

It is therefore ordered, that the joint rate on hard coal from Duluth to stations named in said Schedule "A" now existing on the St. Paul & Duluth and the Minneapolis & St. Louis railroad and the Minneapolis, New Ulm & Southwestern Companies be reduced and fixed at the rate shown in said Schedule "B."

Dated this 19th day of January, A. D. 1899.

By the commission:

A. K. TEISBERG, *Secretary.*

SCHEDULE "B."

From Duluth to stations.	Rate per ton.
Hopkins	$1.32
Minnetonka	1.35
Deephaven	1.38

Excelsior		1.40
Waconia		1.51
Young America		1.56
Norwood		1.57
Hamburg		1.62
Green Isle		1.63
Arlington		1.68
Gaylord		1.75
Winthrop		1.80
Lafayette		1.86
Klossner		1.91
	New Ulm	1.95
29	Gibbon	1.87
	Fairfax	1.96
Franklin		2.01
Morton		2.05
Redwood		2.11
Delhi		2.15
Belview		2.21
Echo		2.23
Wood Lake		2.29
Hanley Falls		2.33
Hazel Run		2.38
Clarkfield		2.42
Boyd		2.48"

That in the proceedings to determine said reasonable joint rate hereinbefore described, said railroad and warehouse commission had full jurisdiction of the matters to be determined and the matters determined in and by said order, and full jurisdiction of said defendant railroad companies, and all of said proceedings were duly and legally conducted, of all of which said defendant companies had due notice and knowledge;

That said order and determination was duly served upon each of the defendant companies on the 19th day of January, 1899; that more than thirty days have elapsed since the making and service of said order and no appeal has been taken by either of said defendant companies from said order. And thereafter and on the 23rd day of February, 1899, said railroad and warehouse commission duly made and entered its order promulgating the said order and determination herein set forth, and duly caused such order of promul-
30 gation to be published in the New Ulm Review, a weekly newspaper printed and published in New Ulm, Brown county, Minnesota, that being one of the stations or points named in said order, the rate to which had been fixed and determined by said order. The said New Ulm Review was and is a weekly newspaper of general circulation in said Brown county printed in the English language and had been so published and circulated for more than one year prior to the publication of said order, and the publication in said New Ulm Review was full, due and legal publication and promulgation of said order hereinbefore mentioned;

That thereafter it being duly made to appear to said railroad and warehouse commission that said railroad companies were unable to and had failed to agree upon a proper division between themselves of the joint through rates so established by said commission, such proceedings were had that said defendant companies were cited to be and appear before said commission on the 23rd day of March, 1899, at 10 o'clock in the forenoon of that day, at the office of the said commission in the city of St. Paul, Minnesota, and were at the same time duly notified that if they failed to agree on such division of such joint through rate on or before said 23rd day of March, 1899, that said railroad and warehouse commission would at such time and place proceed to consider and determine in what proportion such division should be made between said defendant companies;

That said defendant companies duly appeared before said commission at said time and place, and it appearing that no division of said rates had been agreed upon, said railroad and warehouse commission duly proceeded to hear the evidence produced upon said matter, and having duly considered the same, thereafter
31 and on the 8th day of April, 1899, duly made and entered their order of determination upon said division, wherein and whereby it was determined that of the joint through rate so fixed and determined by said railroad and warehouse commission to the various points named therein, the defendant, The St. Paul & Duluth Railroad Company, should be allowed and have one dollar ($1.00) of said rate, and that the balance of said rate should go and be received by the Minneapolis & St. Louis Railroad Company; which said order was thereafter and on the 10th day of April, 1899, duly served upon each of said defendant companies. That more than thirty days have elapsed since the service of said last-mentioned order on said defendant companies and no appeal has in any manner been taken therefrom by either of said defendant companies and the same is now in full force and effect;

That thereafter and on the 10th day of April, 1899, said railroad and warehouse commission again duly promulgated the order made by it fixing and establishing the joint through rates hereinbefore described, and duly caused such schedule of rates together with such order of promulgation to be duly published in said New Ulm Review, and the same was so published in said New Ulm Review on the 12th day of April, 1899;

That the orders and judgments of said railroad and warehouse commission herein referred to are all in full force and effect and were each and all duly made and entered in the course of said proceedings as said railroad and warehouse commission had full authority, jurisdiction and right to do. That no appeal has been taken from any of said orders, nor have any proceedings whatever
32 been instituted to stay the operation of the same, and each of said orders is binding and conclusive upon each of said defendant companies herein;

That notwithstanding that fact, said defendant railroad companies, their officers, agents and employés have failed, neglected and refused, and still fail, neglect and refuse to adopt the schedule of rates

so fixed by said railroad and warehouse commission or keep for public inspection schedules showing such rates, and have refused, failed and neglected, to file with the railroad and warehouse commission copies of schedules of their classifications, rates, fares and charges for the hauling of hard coal in car-load lots in accordance with said determination. And said defendant Minneapolis & St. Louis Railroad Company has refused and still continues to refuse to receive, haul and deliver hard coal in car-load lots at and for the proportion of said joint through rate so allowed, fixed and established by the order of said railroad and warehouse commission as its joint, reasonable and fair proportion of the joint through rate established by said commission as hereinbefore alleged; and has in all things neglected and refused and still continues to neglect and refuse to obey or carry out the orders of said railroad and warehouse commission made and entered in the proceedings hereinbefore set forth.

That there is no plain, speedy and adequate remedy in the course of law by which the petitioner can compel the defendants to obey the order of said commission as hereinbefore set forth.

Now therefore, you, the defendants above named, and each of you, are hereby commanded to, immediately after the receipt of this writ, adopt and publish and keep for public inspection, as
33 provided by law, as the joint through rate to be charged by you as freight for the hauling of hard coal in car-load lots from the city of Duluth, Minnesota, to the points hereafter named, the following rates and charges, to wit:

	Rate per ton.
Hopkins	$1.32
Minnetonka	1.35
Deephaven	1.38
Excelsior	1.40
Waconia	1.51
Young America	1.56
Norwood	1.57
Hamburg	1.62
Green Isle	1.63
Arlington	1.68
Gaylord	1.75
Winthrop	1.80
Lafayette	1.86
Klossner	1.91
New Ulm	1.95
Gibbon	1.87
Fairfax	1.96
Franklin	2.01
Morton	2.05
Redwood	2.11
Delhi	2.15
Belview	2.21
Echo	2.23
Wood Lake	2.29
Hanley Falls	2.33

Hazel Run	2.38
Clarkfield	2.42
Boyd	2.48

34 And that you make and file with the railroad and warehouse commission copies of said schedules, rates, fares and charges, and that from and after the receipt of this writ you receive, haul and transport hard coal in car-load lots from the city of Duluth to the points and stations above named at and for the rate, fare and charge herein set forth; and that for the carrying of such freight no higher or greater rate shall be asked, demanded or received by either of you; and that said respective amounts shall be charged and received as the joint through rate to be charged for such service and shall be divided between you, the said defendant companies, in the proportion hereinbefore set forth, and that you comply in all other respects with the said orders of said railroad and warehouse commission, copies of which are attached to the petition herein, or in case of your failure so to do, you, and each of you, show cause, if any there be, before this court at a special term thereof to be held in the courthouse in the city of St. Paul on Saturday the 1st day of July, A. D. 1899, at 10 o'clock in the forenoon for such failure; and that you then and there make return to this writ with your certificate on such return of having done as you were commanded.

Witness the Honorable Hascal R. Brill, judge of the district court, of the second judicial district of the State of Minnesota in and for the county of Ramsey, this 23rd day of June, A. D. 1899.

[Seal of District Court of Ramsey Co., Minn.]

EDWARD G. ROGERS, *Clerk*,
By G. A. LIMBERG, *Deputy Clerk*.

35 On the filing of the petition hereto annexed, the clerk of the district court of the second judicial district of the State of Minnesota, in and for the county of Ramsey, is directed to issue an alternative writ of mandamus which is hereby allowed in the foregoing form, returnable at special term of said court in the city of St. Paul on Saturday, the 1st day of July, 1899, at 10 o'clock a. m., and the service thereof is hereby directed to be made by delivering to and leaving with L. F. Day, Esq., general manager of the Minneapolis & St. Louis Railway Company at Minneapolis in Hennepin county, Minnesota, and with A. B. Plough, Esq., general manager of the St. Paul & Duluth Railroad Company at St. Paul, Ramsey county, Minnesota, respectively, a copy of said writ together with a copy of this order and a copy of the petition on which said writ was allowed, on or before the 24th day of June, A. D. 1899.

Dated St. Paul, Minnesota, June 23rd, A. D. 1899.

HASCAL R. BRILL,
Judge of the District Court.

(Title of Cause.)

Separate Answer of the Minneapolis & St. Louis Railroad Company.

For its answer and return to the alternative writ of mandamus herein, the Minneapolis & St. Louis Railroad Company says:

George L. Becker, Ira B. Mills and Peter M. Ringdal constitute and are the railroad and warehouse commission of Minnesota. A. K. Teisberg is the secretary of said commission.

36 The St. Paul & Duluth Railroad Company is a common carrier operating a railroad between Duluth and St. Paul, Minnesota.

The Minneapolis & St. Louis Railroad Company is a common carrier operating a line of railroad from Minneapolis, Minnesota, to Angus, Iowa; it also owns and operates a line of railroad extending from Hopkins, Minnesota, on its first-named line, westerly through the State of Minnesota to Watertown, South Dakota. It owns and operates a branch line from Winthrop, on said last-named line, to New Ulm, Minnesota. Said branch line was prior to June 1st, 1899, owned by the Minneapolis, New Ulm & Southwestern Railroad Company, all the capital stock of which last-named company was owned by this defendant. Said The Minneapolis & St. Louis Railroad Company has connections and traffic agreements with other lines of railroad by which it has access to New York, Chicago, and all the principal business centers of the United States, and is engaged in both interstate and local traffic.

Prior to March 3d, 1899, the St. Paul & Duluth Railroad Company, the Minneapolis & St. Louis Railroad Company, and the Minneapolis, New Ulm & Southwestern Railroad Company had voluntarily made and put into effect a joint tariff on hard and soft coal and coke, in car-loads, between Duluth on Lake Superior and points on the lines of the Minneapolis & St. Louis and the Minneapolis, New Ulm and Southwestern railroads. Earnings under such joint tariff were divided between the carriers participating in the transportation. The rate fixed by such tariff and collected for the transportation of hard coal over the respective railroads of the three above-described railroad companies from Duluth to the points

37 named in "Schedule A" referred to and made a part of the petition for the alternative writ of mandamus is correctly shown in said schedule and is as follows:

From Duluth to stations.	Rate per ton.
Hopkins	$1.75
Minnetonka	2.00
Deephaven	2.00
Excelsior	2.10
Waconia	2.35
Young America	2.45
Norwood	2.50
Hamburg	2.50
Green Isle	2.50

Arlington	2.50
Gaylord	2.50
Winthrop	2.50
Lafayette	2.50
Klossner	2.50
New Ulm	2.50
Gibbon	2.50
Fairfax	2.50
Franklin	2.50
Morton	2.50
Redwood	2.50
Delhi	2.50
Belview	2.50
Echo	2.50
Wood Lake	2.50
Hanley Falls	2.50
Hazel Run	2.50
Clarkfield	2.50
Boyd	2.50

38 The stations above named are situated upon the line of the Minneapolis & St. Louis railroad except the stations of Lafayette, Klossner, and New Ulm, which are situated on the Minneapolis, New Ulm & Southwestern railroad.

Earnings for carrying hard coal in car-loads under the joint tariff were divided as follows: The St. Paul & Duluth Railroad Company received one dollar per ton for transportation over its railroad from Duluth to Minneapolis. Earnings in excess of one dollar per ton were paid to the Minneapolis & St. Louis, and the Minneapolis, New Ulm and Southwestern Railroad Companies.

The distance by the line of the St. Paul & Duluth railroad from Duluth to St. Paul is one hundred and fifty-two miles, and to Minneapolis one hundred and sixty miles. The rate to the two cities is the same. Both cities are distributing and transfer points from which coal shipments coming to Minnesota by the Great Lakes are distributed to local points on the various railroads throughout the State.

Coal is transported by the St. Paul & Duluth Railroad Company from Duluth to St. Paul and Minneapolis in vast quantities by through trains doing no local business, the volume of such traffic being so great that it can be handled profitably at a low rate. The local tariff of the St. Paul & Duluth Railroad Company for the transportation of hard coal from Duluth to St. Paul and Minneapolis is and has been at all times referred to in the pleadings herein one dollar and twenty-five cents per ton and said tariff is just and reasonable.

39 In order to induce this defendant to enter into said joint tariff to the end that the St. Paul & Duluth Company might secure the business of transporting coal to supply the territory tributary to this defendant's railroad, it agreed upon the division of earnings herein stated.

Hard coal transported by the defendants herein and the Minne-

apolis, New Ulm and Southwestern Railroad Company under the joint tariff was delivered to this defendant at its yards in Minneapolis. Coal destined to Lafayette, Klossner and New Ulm was delivered by this defendant to the Minneapolis, New Ulm & Southwestern Railroad Company at Winthrop.

Distances from Minneapolis to the stations enumerated in "Schedule A" are as follows:

Hopkins	8.7 miles.
Minnetonka	11.7 "
Deephaven	15.8 "
Excelsior	18.8 "
Waconia	31.5 "
Young America	39.1 "
Norwood	40.3 "
Hamburg	43.8 "
Green Isle	48.1 "
Arlington	54.3 "
Gaylord	62.3 "
Winthrop	69.3 "
Lafayette	76.1 "
Klossner	82.1 "
New Ulm	88 "
Gibbon	77.4 "
Fairfax	86.9 "
Franklin	94.9 "
Morton	100.4 "
Redwood	106.8 "
40 Delhi	113.3 "
Belview	119.9 "
Echo	123.4 "
Wood Lake	129.7 "
Hanley Falls	134.8 "
Hazel Run	141.0 "
Clarkfield	146.2 "
Boyd	152.6 "

The rate fixed by the joint tariff in effect prior to March 3rd, 1899, for the transportation of hard coal from Duluth to the points upon the line of railroad of this defendant and to points upon the Minneapolis, New Ulm and Southwestern railroad designated in said "Schedule A" were and are reasonable and just. Such rates are not exorbitant or excessive, nor do they yield or afford anything in excess of a reasonable, just and fair compensation and return for the service rendered.

That part of the joint rate in excess of one dollar per ton paid to the St. Paul & Duluth Railroad Company for its service was and is a just and reasonable compensation for the service rendered by this defendant and the Minneapolis, New Ulm & Southwestern Railroad Company in transporting hard coal from Minneapolis to points on the lines of said two last-named railroads. The charges made and collected for that service were not exorbitant or unreasonable nor

did they yield more than a fair and reasonable compensation for such service.

It is admitted that on September 22nd, 1898, the railroad and warehouse commission adopted the resolution a copy of which is attached to the petition for the alternative writ of mandamus as
41 "Exhibit A." It is also admitted that said resolution was served upon this defendant and that pursuant to such service this defendant appeared before said commission and answered thereto as follows:

MINNEAPOLIS, MINN., *October 12th*, 1898.

In the matter of the reasonableness of the freight rate charged on hard coal from Duluth to New Ulm by the Chicago & Northwestern and the Chicago, St. Paul, Minneapolis & Omaha railways, and the St. Paul & Duluth, Minneapolis & St. Louis railroads, and the Minneapolis, New Ulm & Southwestern Railroad Company.

Mr. Ira B. Mills, Mr. Nathan Kingsley, Mr. George L. Becker, State warehouse and railroad commissioners, St. Paul, Minnesota:

DEAR SIRS: Acknowledging your resolution under date of September 22nd on the above subject and replying thereto, we beg to submit to your honorable body that the present rate of $2.50 per ton on hard coal from Duluth to New Ulm is not, in our judgment, excessive and does not afford the carriers undue revenue for their services.

The shortest distance from Duluth to New Ulm is via the St. Paul & Duluth, Minneapolis & St. Louis, and Minneapolis, New Ulm & Southwestern railroads, being two hundred and fifty miles.

We hold that the aforesaid rate is not excessive in itself for this distance, as it does not afford undue compensation to any of the carriers that participate in a division of the same, viz., the St. Paul & Duluth, Minneapolis & St. Louis and Minneapolis, New Ulm
42 & Southwestern Railroad Companies. The Minneapolis, New Ulm & Southwestern railroad has not paid its operating expenses since it was built and has made no returns upon the capital invested whatever. To reduce the earnings on anthracite coal shipments would entail a greater hardship to the owners of that property, who, as already stated, have not received any return whatever on their investment since the road was built.

A reduction in the hard-coal rate to New Ulm would also entail a material loss of revenue to the Minneapolis & St. Louis Railroad Company, by reason of its reducing the rate to so large a number of points on the Minneapolis & St. Louis railroad intermediate between Duluth and New Ulm and where the New Ulm rate now applies, such rate reaching from New Ulm as far eastward as Norwood.

It is true that the rate from Duluth to Madison, Minnesota, a distance of three hundred and thirty-three miles, is the same as to New Ulm, a distance of two hundred and fifty miles, but the Minneapolis & St. Louis Railroad Company is not responsible for the rate at

Madison. It is unreasonably low for the distance that the commodity has to be transported over the St. Paul & Duluth, Minneapolis & St. Louis and Wisconsin, Minnesota & Pacific railways. It is made necessary, however, by reason of this rate prevailing at a point opposite Madison, namely Appleton, situated on the Great Northern railway, the distance from Duluth via the Great Northern railway to Appleton being two hundred and fifty miles. The same rate must be made to Madison as to Appleton to afford dealers located at Madison, on the Wisconsin, Minnesota & Pacific railroad, an
43 opportunity to distribute their coal in territory equidistant between Madison and Appleton and other towns in that vicinity. The rate from Duluth to New Ulm is not excessive in comparison with the rate of Appleton, about the same distance from Duluth as New Ulm.

It is believed by this company that your honorable body will give due consideration to the facts as set forth and will, we trust, coincide with our views as above expressed.

Yours truly,

(Signed) W. M. HOPKINS,
General Freight Agent."

It is true that on January 19th, 1899, the railroad and warehouse commission made an order and decision by which it assumed to determine and establish a joint through rate for the transportation of hard coal from Duluth to the several stations upon the lines of railroad of this defendant and the Minneapolis, New Ulm & Southwestern Railroad Company, designated in "Schedule A."

It is admitted that "Schedule B" attached to the petition for the alternative writ of mandamus is a true copy of said order and that the order was duly served on this defendant; also that an order promulgating the same was made and published as set forth in said petition.

March 3rd, 1899, this defendant canceled and withdrew from the joint tariff previously made with the St. Paul & Duluth Railroad Company and the Minneapolis, New Ulm and Southwestern Railroad Company for the transportation of hard coal from Duluth to the points named in "Schedule A" and this defendant has not at any time since said last-named date had any joint rate or
44 agreement with said St. Paul & Duluth Railroad Company for the transportation of hard coal from Duluth to said points and has no such joint rate or agreement and has at all times declined and refused and now declines and refuses to enter into such joint tariff or agreement.

It is admitted that the railroad and warehouse commission made and promulgated the orders attached to the petition for the alternative writ of mandamus as "Exhibit C" and "Exhibit D," respectively, and that publication thereof was made as stated in the petition.

This defendant denies that the several orders of the railroad and warehouse commission hereinbefore referred to are binding or conclusive upon this defendant. On the contrary, said orders by which

said commission assumes to compel this defendant to enter into a joint tariff with the St. Paul & Duluth Railroad Company and to make a joint through rate with the last-named company for the transportation of hard coal from Duluth to local stations upon the line of the Minneapolis & St. Louis, and the Minneapolis, New Ulm & Southwestern railroads, and by which said commission requires the defendants herein to transport hard coal from Duluth to the points upon the railroads of this defendant and the line of the Minneapolis, New Ulm & Southwestern Railroad Company designated in "Schedule B" of the petition for the alternative writ of mandamus, at the rate and for the compensation fixed by said "Schedule B;" and by which the railroad and warehouse commission assumes to divide and apportion the rate so fixed, between the defendants herein, are, and ever have been, wholly void; and said orders and each of them, that is to say, the orders referred to in the petition for the alternative writ of mandamus herein and identified as "Exhibit B" (to which is attached and which includes "Schedule A" and "Schedule B") "Exhibit C" and "Exhibit D" to said petition, were made without right, authority or jurisdiction and are and ever have been wholly without force, virtue or effect as against this defendant for the following reasons:

45

1st. The railroad and warehouse commission is not under the constitution and statutes of Minnesota authorized to determine finally the question as to whether or not rates for the transportation of persons or property are reasonable. Such question is judicial and can only be determined by the courts organized in conformity with the State constitution as a part of the judicial department of State government as provided by section one, article three, and section one, article six, of such constitution.

2d. The proportion of the joint through rate fixed by the commission by its several orders hereinbefore referred to as the compensation to be paid to this defendant for the service rendered in transporting hard coal in car-loads from Minneapolis to the points upon its railroad and the Minneapolis, New Ulm & Southwestern railroad is wholly inadequate and will not afford this defendant reasonable and adequate compensation for the service rendered. Such rates are much less than the just and reasonable rates now charged and received by this defendant and by other carriers of this State for like service. If said orders be enforced and said rate made effective, this defendant will be deprived of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

46

3d. The law of Minnesota embodied in chapter 91, General Laws of 1895, and particularly in subdivisions B, C and D of section three of said chapter, and any and all laws of said State which assume to confer upon the railroad and warehouse commission the power and authority to compel two or more railroad companies to enter into a joint tariff and make or adopt a joint rate for the transportation of property over the lines of said companies and which assume to authorize said commission to make a division of joint earnings between two or more railroad companies, is violative

of the fourteenth amendment to the Constitution of the United States in this: .

It denies to this defendant the right to contract in reference to its own business and thus takes its property without its consent. It compels this defendant to enter into involuntary, unreasonable and unprofitable contracts with other carriers at the instance of third parties, resulting in a loss of business and revenue on the part of the defendant. It requires this defendant to enter into involuntary contracts with other carriers designated by third parties. It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed. It requires this defendant to hire and use the cars and vehicles of other carriers in the transportation of traffic upon its own line. It deprives this defendant of all right to make its own contracts with other carriers and delegates to a non-judicial body the right to fix and determine the proportion of a joint through rate which shall be paid to the defendant, thereby depriving this defendant of its property,—the right to use the same, and the right to contract in relation thereto; it denies to this defendant the equal protection of the laws which protect and insure to all
47 citizens the right to contract in relation to their property, and deprives the defendant of its property without due process of law. It abridges the privileges and immunities of this defendant as a citizen of the United States by depriving it of the right to control, conduct and manage its own business.

4th. The order of the commission establishes a rate which constitutes and is a discrimination in favor of all dealers in and consumers of hard coal at the points covered by the order, as against other dealers and consumers, citizens of this State, and discriminates against the defendant as compared with the rates allowed other carriers for like service.

5th. The lines of railroad owned and operated by this defendant extend into other States. It has in such other States terminals and instrumentalities requisite to perform its duties as a carrier of persons and property. It is engaged in interstate business. The cost, maintenance, cost of operation, fixed charges, taxes and other items of expense incurred in acquiring, constructing, maintaining and operating defendant's railroad as an entirety determine the value of the property used in transporting the traffic designated in the orders of the commission. The commission is without authority or jurisdiction to distinguish or separate domestic and interstate earnings being without jurisdiction to regulate interstate commerce. It has no jurisdiction to fix rates based upon the value and cost of operation of interstate railroads.

6th. It compels this defendant at the instance of the railroad and warehouse commission to enter into a business agreement with other carriers by which each of the parties to the agreement are obliged to accept a sum for the transportation of property over its
48 line less than the just and reasonable local rate for the same service.

7th. It compels this defendant to transport traffic originating upon the line of another railroad designated by the railroad and ware-

house commission for a different and less rate than it may lawfully collect and receive for the same service where the traffic originates upon its own line, thereby forcing defendant to give a preference and discriminate in favor of certain traffic and certain localities.

8th. It compels this defendant to charge and collect different rates per ton per mile for traffic originating upon other railroads from that collected for traffic local to its own railroad notwithstanding the service rendered is identical.

And the defendant says that in the matters and particulars stated and in so far as they assume to authorize the orders of the railroad and warehouse commission herein referred to the said laws made and enacted by the State of Minnesota are in conflict with and violative of the fourteenth amendment to the Constitution of the United States and are wholly void.

Wherefore the defendant prays that this proceeding be dismissed, and that this defendant go hence with costs.

Dated July 15th, 1899.

ALBERT E. CLARKE,
Attorney for the Minneapolis & St. Louis R. R. Co., Answering Defendant Herein.

(Duly verified.)

49 (Title of Cause.)

To W. B. Douglas, attorney general, and C. D. & Thos. D. O'Brien, attorneys for complainant:

You will please take notice that the annexed is a true copy of the proposed case and bill of exceptions in the above-entitled action which will be presented to the Hon. George L. Bunn, judge of said court, for settlement and allowance as the settled case and bill of exceptions herein, on which when so allowed the defendant will move for a new trial herein.

ALBERT E. CLARKE,
Attorney for the Minneapolis & St. Louis Railroad Company,
1104 *Guaranty Loan Building, Minneapolis, Minn.*

Dated February 5th, 1900.

(Title of Cause.)

This action came on for hearing before Hon. George L. Bunn, August 3, 1899.

Messrs. Ira B. Mills and Thomas D. O'Brien appeared in behalf of plaintiff.

Mr. A. E. Clarke appeared in behalf of defendant Minneapolis & St. Louis Railroad Company.

Messrs. Hadley & Armstrong appeared in behalf of defendant St. Paul & Duluth Railroad Company.

Mr. Clarke opened the case.

Mr. CLARKE: The Minneapolis & St. Louis Railroad Com-
50 pany, one of the defendants herein, moves the court for judgment dismissing and vacating the alternative writ of man-

damus issued in this case and setting aside and vacating the order of the railroad and warehouse commission referred to in the petition for the alternative writ of mandamus and for the enforcement of which order this action is brought. This motion is based upon the files, pleadings and records in this case, and is made upon the grounds that it appears from the pleadings and the uncontroverted facts herein that said railroad and warehouse commission of the State of Minnesota, was without authority of jurisdiction to make the order, for the following reasons:

1. The Minneapolis & St. Louis Railroad Company is an interstate carrier owning and operating a continuous line of railroad extending into and through the States of Iowa, Minnesota and South Dakota, which said railroad is equipped, maintained and operated as an entirety. That said commission cannot understandingly and rightfully establish a reasonable rate and tariff for the transportation of property over any part of the line of this defendant's railroad without making inquiry and investigation as to the value of said railroad as an entirety, its capitalization, bonded indebtedness, fixed charges, operating expenses, gross and net earnings, terminal property, equipment, and all the items of cost, maintenance, operation and expense, of every character, which enter into the transaction of its business, and because said railroad property is situate in other States than the State of Minnesota, and because all of the property of said defendant is used in the transaction of interstate business, said commission is without jurisdiction to make such inquiry and investigation.

51 2. The law of the State of Minnesota creating said railroad and warehouse commission, and from which it derives its authority, does not authorize nor assume to authorize said railroad and warehouse commission to make a special rate applicable only to a certain section or portion of the defendant's railway, nor to make a special rate for the transportation of merchandise between particular stations, nor to make a special rate applicable only to a certain class of merchandise originating at a certain point or received from certain shippers or initial carriers. The only authority conferred upon said railroad and warehouse commission by the laws of this State is authority to make and fix the maximum rate applicable to all portions of defendant's line and not to any particular portion thereof and applicable alike to all traffic passing over the line of defendant's railroad, without regard to the point of origin and without regard to the fact that the merchandise received for transportation is received from an individual or from another carrier. That the authority conferred upon said commission is general and not special, and assumes to authorize the establishment and enforcement of maximum rates upon railroads as an entirety and does not confer authority to make rates applicable only to a certain section or portion of defendant's railway nor to a certain class of shipments.

3. The order of said railroad and warehouse commission requiring this defendant to enter into a joint tariff with its codefendant, The St. Paul & Duluth Railroad Company, and by which said railroad and warehouse commission assumes to establish and put in effect a joint through rate for the transportation of hard coal from Duluth,

Minnesota, to points upon the line of this defendant and the Minneapolis, New Ulm & Southwestern railroad, which said coal is
52 to be transported over the lines of both the defendants herein and the railroad of said The Minneapolis, New Ulm & Southwestern Railroad Company, and the order of the commission by which it assumed to apportion and divide the said joint rate between the defendants in this proceeding and determine what proportion of said joint rate each of the defendants should receive for the service rendered by it, were made without right, authority, or jurisdiction, and were and are wholly without virtue or effect as against this defendant, for the following reasons:

A. The railroad & warehouse commission is not under the constitution and statutes of Minnesota authorized to determine finally the question as to whether or not rates for transportation of persons or property are reasonable. Such question is judicial, and can only be determined by the courts organized in conformity with the State constitution as a part of the judicial department of State government, as provided by section I, article III, and section I, article VI, of such constitution.

B. The law of Minnesota embodied in chapter 91, General Laws 1895, and particularly in subdivisions B, C and D, section 3, of said chapter, as well as all laws of said State which assume to confer upon the railroad & warehouse commission the power and authority to compel two or more railroad companies to enter into a joint tariff and to make or adopt a joint rate for the transportation of property over the lines of said company, and which assume to authorize said commission to make a division or apportionment of joint earnings between two or more railroad companies is violative of the fourteenth amendment to the Consti-
53 tution of the United States, in this: It denies to this defendant the right to contract in reference to its own business and thus take its property without its consent; it compels this defendant to enter into involuntary, unreasonable, and unprofitable contracts with other carriers at the instance of third parties, resulting in a loss of business and revenue on the part of defendant; it requires this defendant to enter into involuntary contracts with other carriers designated by third parties; it assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed; it requires this defendant to hire and use the cars and vehicles of other carriers in the transportation of traffic upon its own line; it deprives this defendant of the right to make its own contracts with other carriers, and delegates to a non-judicial body the right to fix and determine the proportion of a joint rate which shall be paid to defendant, thereby depriving this defendant of its property, the right to use the same, and the right to contract in relation thereto; it denies to this defendant the equal protection of the laws which protect and insure to all citizens the right to contract in relation to their property, and deprives the defendant of its property without due process of law; it abridges the privileges and immunities of this defendant as a citizen of the United

States, by depriving it of the right to control, conduct, and manage its own business.

C. The order of the commission establishes a rate which constitutes and is a discrimination in favor of all dealers in and consumers of hard coal at the point covered by the order, as against other dealers and consumers, citizens of this State, and discriminates
54 against the defendant as compared with the rates allowed other carriers for like service.

D. It discriminates in favor of traffic transported over the line of defendant's railroad, which traffic is received from another common carrier.

E. It compels the defendant, at the instance of the railroad & warehouse commission, to enter into a business agreement with other carriers, by which each of the parties to the agreement are obliged to accept a sum for the transportation of property over defendant's line less than the just and reasonable local rate for the same service.

F. It compels this defendant to transport traffic originating upon the line of another railroad designated by the railroad & warehouse commission for a different and less rate than it may lawfully collect and receive for the same service where the traffic originates upon defendant's own line, thereby forcing the defendant to give a preference and discriminate in favor of certain traffic and certain localities.

G. It compels this defendant to charge and collect different rates per ton per mile for traffic originating upon other railroads from that collected for traffic local to its own railroads, notwithstanding the service is identical.

Mr. O'BRIEN: The plaintiff now moves for judgment upon the petition and return, that a peremptory writ of mandamus be issued directed to the defendants, directing and commanding them as prayed in the petition. I make the motion for judgment upon the pleadings, may it please the court, for the following reasons: It is claimed upon behalf of the plaintiff that the various orders made and entered by the railroad & warehouse commission of the
55 State of Minnesota in the proceedings to fix a joint through rate upon hard coal from Duluth to various points upon the line of the defendant Minneapolis & St. Louis Railroad Company, not having been appealed from by either of the roads or common carriers affected, or by any other person, are binding and conclusive and are final and must be so considered in this proceeding.

Second, that the answers interposed respectively by the defendants set forth no defense to the application for a peremptory writ of mandamus, and that therefore it is apparent from the pleadings in this action that the State is entitled to judgment as prayed.

Mr. HADLEY: Your honor, so far as the St. Paul & Duluth Railroad Company is concerned, we do not care to make any argument on this motion, nor will we consent to the motion of the plaintiff here. The St. Paul & Duluth is in this position: The rate which has been made by the commission is the same rate which they received before; we find no particular fault with the rate, but we do not admit that the commission has the right to make a joint rate

but insist that it has no such power. We do not want to be held as consenting that the writ shall be made permanent.

After argument on the motions, by Mr. O'Brien and Mr. Clarke, the court said:

The COURT: This matter has been heard on the pleadings and I am ready to decide it, but my decision will make it necessary for you to offer testimony.

It was agreed that the testimony be taken before the court reporter, beginning August 22, 1899, and presented to the court September 20, 1899, and that all objections which might be taken to testimony may be taken when the testimony shall be presented to the court.

56 The following testimony was taken before the court reporter, beginning August 22, 1899, in district court room No. 4, St. Paul:

Messrs. Ira B. Mills and Thomas D. O'Brien appeared for plaintiff.

Mr. A. E. Clarke appeared for defendant Minneapolis & St. Louis Railroad Company.

Mr. James D. Armstrong appeared for defendant St. Paul & Duluth Railroad Company.

It is agreed that all objections to relevancy, competency and materiality may be raised upon the trial, the same as if made here to each question.

E. B. OBER, having been sworn, testified as follows:

Examined by Mr. CLARKE:

Q. You reside in St. Paul, do you, Mr. Ober?

A. Yes, sir.

Q. What is your occupation?

A. Assistant general freight agent of the Chicago, St. Paul, Minneapolis & Omaha.

A. I wish you would state as accurately as you can the number of tons of hard coal shipped into St. Paul and Minneapolis from Lake Superior points, including Duluth, Superior, West Superior and Bayfield, during the year 1898.

A. I have not any accurate statistics made up. We did not understand that you wanted those figures or we could have had it made up.

Q. Well, state it as nearly as you can.

A. Well, I don't know as I could come anywhere near the tonnage, because, of course, to carry a very large tonnage to the twin cities that does not end there.

Q. What railroads carry the hard coal from the points I have named—Duluth, West Superior, Superior and Bayfield—to St. Paul and Minneapolis?

57 A. There are three roads; the Eastern Minnesota, the St. Paul & Duluth, and the Omaha. And the Northern Pacific has recently been a factor in the business.

Q. The tonnage carried by the Northern Pacific is comparatively small, I suppose, is it not?

A. Yes. They are a new factor and they have not cut much of a figure yet.

Q. You say you have not made any computation or examination so that you cannot give the figures with comparative accuracy?

A. Well, no. I suppose I could come within a hundred thousand tons of it. Very nearly half a million tons.

Mr. O'BRIEN: Does that mean all three?

The WITNESS: No, I refer purely to our own road.

Q. That is the Omaha?

A. That means business that is carried by our road, either as far as St. Paul or Minneapolis.

Q. Does that include coal only for local consumption, or through business as well?

A. That includes all business.

Q. Everything?

A. I know pretty well what the local consumption is of the twin cities—the aggregate. That is, I know quite certainly as to the tonnage that is carried by the Lake Superior lines, all of them, in the aggregate, to the twin cities, that is consumed locally.

Q. You say you are quite certain as to the amount carried by all the Lake Superior roads for local consumption?

A. Yes, sir.

Q. What is that? What is your estimate of that?

A. About 200,000 tons.

Q. You think that 200,000 tons per annum would be a fair
58 estimate of all the hard coal carried by the Lake Superior roads for local consumption in the twin cities?

A. Yes, sir.

Q. And that an approximate estimate of the amount carried by the Omaha, for all purposes, including through business, would be half a million tons?

A. Well, say 400,000 tons. It may be a good deal more than that. It is an enormous territory; it means all territory west of the Mississippi river. That would be a very conservative figure.

Q. How long will it take you, Mr. Ober, to prepare a statement advisedly by which you could show the actual tonnage of hard coal carried by your road between points on Lake Superior and the twin cities, for all purposes, during the year 1898? That includes both for local consumption and through business—points beyond Minneapolis and St. Paul.

A. Well, that would be quite an undertaking; it means an immense amount of detail information, you know—checking up the different points to know whether the coal would go through the twin cities. We could get at it all right.

Q. Your records undoubtedly show——

A. The billings shows the destination of freight. The destination of the freight would indicate the location of points, you know, and show whether we had to carry it through St. Paul or not. The information is there, but it is——

Q. Your distributing point is St. Paul, isn't it, rather than Minneapolis?

A. Yes, sir.

Q. Or Minnesota transfer?

A. Yes, sir. Well, it is St. Paul principally.

Q. Minnesota transfer is situated between St. Paul and Minneapolis. Well, I ask you again how long it would take you to
59 make an accurate statement of that kind so that you could testify advisedly as to the number of tons of hard coal transported during the year 1898 over the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, which you represent, between points on Lake Superior and to or beyond cities of St. Paul and Minneapolis.

A. Well, I am not sure in regard to some statistics that we have there in the office; if we have got them—and I have a pretty strong recollection that we started in a little over a year ago to keep them in that form—if we have them that way we could make that up in a day; if we haven't got it, why then we would need possibly ten days.

Q. Well, will you prepare such a statement and file it with the commissioner who is taking this testimony, at any time between now and the 1st day of September? Just give the number of tons; I don't ask for any details.

A. Well, I will endeavor to do it. I cannot say positively, because it may mean an immense amount of work. Mr. Hopkins can possibly tell you better what it means to get up a statement of that character. If you don't compile your information in a certain form it means an immense amount of work.

Mr. ARMSTRONG: It depends on how your statistics were kept.

The WITNESS: Yes, I shall endeavor to do it.

Mr. CLARKE: The ultimate fact that I want to show is this: I want to show how many tons of hard coal were transported during the year 1898, by all railroads, from Lake Superior points to St. Paul and Minneapolis, including coal for local consumption and through business; that is, the tonnage of hard coal transported from points on Lake Superior to or beyond St. Paul and Minneapolis. If I can get the certain number of tons I don't care whether it
60 is given in a lump or is divided up between the roads and given separately. If you can aid me in getting that in the shortest and most direct way, that is all I want.

The WITNESS: Yes, sir.

Mr. CLARKE: Now I will ask you, for my own information, whether it will be necessary to put on the freight agents of the different roads and get the figures showing the amount carried by each road separately, or whether any one of you can, if afforded proper and reasonable time and opportunity, give me the total tonnage that I ask for; just the number of tons, without any explanation or details.

The WITNESS: Well, of course I don't know anything about the other roads—what form they have got their statistics in. We would be perfectly willing to consult with the other companies and see if

we could get an aggregate figure. I know what you are after, and if they have got the figures we can put them all in one lump and make one report.

Mr. CLARKE: Well then we will leave it in that way, so far as your road is concerned; I will ask you to prepare that statement and have it ready by the first day of September to file with the commissioner who is taking this testimony, and in the meantime, if it is preferable to the representatives of the other roads, they can give you a statement of the total tonnage; I am willing to accept that instead of separate reports.

The WITNESS: All right, sir, we can consult with the other coal-carrying lines, and if they are agreeable, we can make the aggregate statement.

Mr. CLARKE: Yes, sir. I would be very glad if you would do that, and I will leave it in that way for the present.

61 FRANK NAY, having been sworn, testified as follows:

Examined by Mr. CLARKE:

Q. You are the auditor of the Minneapolis & St. Louis Railroad Company, are you not, Mr. Nay?

A. Yes, sir.

Q. And keep the records of that company and its business?

A. Yes, sir.

Q. What is the amount of the capital stock outstanding of the Minneapolis & St. Louis Railroad Company?

A. $10,000,000, June 30, 1899.

Q. What was the amount of the bonded indebtedness, the same date?

A. $17,800,000.

Q. What rate of interest does that bonded indebtedness bear?

A. Various rates; four, five, six and seven per cent.

Q. State the names of the trustees of the various mortgages, the amount of the various mortgages, and the interest upon the bonds secured by each.

A. I am not certain that I can give the trustees; I think the Central Trust Company is the trustee of all of them; that is my recollection; I would not be positive of it.

Mr. CLARKE: No, the Farmers' Loan & Trust Company is one, but it doesn't matter about that, we can supply that later. Just give it by mortgages.

WITNESS: There is the Minneapolis & Duluth mortgage, dated January 1, 1877, $280,000, interest at seven per cent. Then there is the Minneapolis & Merriam Junction mortgage, dated January 1, 1877, $455,000, interest seven per cent. Then the Merriam junction & Albert Lea mortgage, dated February 1, 1877, $1,100,000, bearing interest at seven per cent. Iowa extension mortgage, dated

62 June 2, 1879, $1,100,000, interest seven per cent. Southwestern extension mortgage, dated December 1, 1880, $636,000 interest seven per cent. Pacific extension mortgage, dated April 1

1881, $6,000,000, interest six per cent. First consolidated mortgage, dated November 2, 1894, $10,000,000, interest five per cent. First & refunding mortgage, dated March 1, 1899, $25,000,000, interest four per cent.

Q. Of the several items in relation to which you have testified, you may state whether the full bonded indebtedness represented by each is now outstanding or whether any portion of the bonds are still unissued; if so, state what are unissued?

A. The following are only partially outstanding:

Merriam junction & Albert Lea, amount outstanding.....	$950,000
Iowa extension, amount outstanding.....	1,015,000
Pacific extension, amount outstanding.....	1,382,000
First consolidated, amount outstanding.....	5,282,000
First & refunding, amount outstanding.....	7,800,000

Q. The amount actually outstanding, and which constitutes a lien upon the property of the company, is $17,800,000?

A. Yes, sir; $17,800,000.

Q. And stock $10,000,000?

A. $10,000,000.

Q. What was the cost of the road and equipment?

A. The cost to June 30, 1899, was $23,390,560.15.

Q. When did the fiscal year of the company end?

A. June 30th.

Q. What were the gross earnings of the Minneapolis & St. Louis railroad for the fiscal year ending June 30th, 1899?

A. $2,500,004.36.

Q. What, if any, other income did it have?

A. Received interest from investments, $25,952.41; in-
63 terest and exchange, $18,936.19; from trackage and various rentals, $151,708.35.

Q. What were the total receipts from all sources, including earnings, interest on investments, interest and exchange, trackage and other rentals, for the fiscal year ending June 30th, 1899?

A. $2,696,601.31.

Q. What were operating expenses for the same year?

A. $1,438,004.84.

Q. And the taxes?

A. $84,700.25.

Q. The interest on the bonded debt?

A. $659,540.

Q. What other items of expenditure were made during that year?

A. There was expended for trackage and other rentals $55,694.18.

Q. What were the total expenditures for the fiscal year?

A. $2,237,939.27.

Q. What was the net income?

A. $458,662.04.

Q. Now, if the whole of the net income, without reserving any-

thing, were devoted to the payment of dividends on capital stock, what percentage would it pay?

A. It would pay about four and one-half per cent.

Q. Would it be practicable in the operation of the railroad to apply every dollar of the net income to the payment of dividends?

A. No, sir. It never has been done to my knowledge.

Q. Have you examined the schedule of rates made by the railroad and warehouse commission of this State, which is applicable to certain stations on the line of the Minneapolis & St. Louis and Minneapolis, New Ulm & Southwestern railroads, as between Minneapolis and the points upon the lines of those railroads named in the order?

A. Yes, sir.

Q. That schedule I refer to is Schedule B attached to the
64 petition for the alternative writ of mandamus (showing witness the petition and schedule)?

A. Yes, sir; I have examined that.

Q. When did the Minneapolis, New Ulm & Southwestern railroad become the property of the Minneapolis & St. Louis Railroad Company?

A. March 1, 1899; that is when they began to treat it as a part of their system.

Q. Prior to that it was an independent corporation?

A. It was an independent corporation.

Q. The stock of which was owned by the Minneapolis & St. Louis?

A. Yes, sir.

Q. Did it prior to that date have its own officers?

A. Yes, sir.

Q. And directors?

A. Yes, sir.

Q. And was operated in all respects as an independent and separate corporation, was it not?

A. Yes, sir.

Q. Did the Minneapolis, New Ulm & Southwestern Railroad Company at any time during its existence pay operating expenses?

A. As I recently came with the road I have not examined the acaounts back to the time they first existed.

Q. Well, I will change that question, then. At the time the order of the commission was made establishing the tariff referred to as Schedule B, was the Minneapolis, New Ulm & Southwestern Railroad Company earning enough money to pay its operating expenses under the tariffs then existing and in force prior to the making of that order?

A. No, sir; it was not.

Q. What were the comparative earnings and operating expenses of the Minneapolis, New Ulm & Southwestern Railroad Company at that time?

A. I have them for ths fiscal year ending June 30, 1899. The gross earnings for that period were $33,884.10; the operating
65 expenses, taxes, and interest on bonded debt amounted to

$41,784.64; which would result in a deficit of about $8,000 for the year.

Q. After the transfer of the ownership of the Minneapolis, New Ulm & Southwestern to the Minneapolis & St. Louis the accounts were kept separate, were they?

A. Yes, sir.

Q. And the deficit you speak of is a deficit that appeared June 30, 1899?

A. Yes, sir.

Q. For the fiscal year?

A. Yes, sir.

Q. Now I will ask you upon what basis earnings relative to the transportation of property over the lines of the Minneapolis & St. Louis railroad and the Minneapolis, New Ulm & Southwestern railroad was made. Was it a mileage basis, or upon what basis?

A. Upon business from Minneapolis.

Q. Upon business passing over the line of both roads?

A. Yes, sir.

Q. Upon a mileage basis?

A. No; the Minneapolis, New Ulm & Southwestern road is allowed thirty per cent. of the revenue, regardless of what the mileage amounts to.

Q. Is allowed thirty per cent. of the revenue?

A. Yes, sir. That would be much more than its *pro rata* on a mileage basis.

Q. There was an arbitrary division, then, of rates?

A. Yes, sir.

Q. Between the Minneapolis & St. Louis Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company?

A. Yes, sir.

Q. That applied, did it, to all business passing over both lines—the joint line made by the two lines?

A. I don't remember as to that—all business; I think it
66 did, but I would not say positively as to that. I know it applies to the business from Minneapolis to points on the New Ulm & Southwestern.

Q. You are correct in your understanding; it applied to the whole line. Now I want to ask you whether the thirty per cent. arbitrary division allowed the Minneapolis, New Ulm & Southwestern would amount to more or less than its earnings net if divided on a mileage basis.

A. It would amount to considerable more.

Q. The arbitrary division would be favorable to the Minneapolis, New Ulm & Southwestern?

A. Yes, sir.

Q. That method of keeping accounts was in force, was it not, during the year ending June 30, 1899, in which this deficit occurs?

A. Yes, sir.

Q. Have you made a computation to determine the average cost of operation per ton per mile for the fiscal year ending June 30,

1899, covering the whole system of the Minneapolis & St. Louis railroad?

A. Yes, sir.

Q. Have you made a computation showing the cost of operation per ton per mile over that portion of the line covered by the rates made by the railroad and warehouse commission?

A. Yes, sir.

Q. What is the Western division of the Minneapolis & St. Louis railroad?

A. It is the line extending from Hopkins to Morton, Minnesota.

Q. Where is Hopkins?

A. Hopkins is located about nine miles from Minneapolis, on the line of the Minneapolis & St. Louis.

Q. On the main line?

A. Yes, sir. It is at the junction of the main line and the branch running out to Morton.

67 Q. The Western division, then, is a line which runs from Hopkins, on the main line, west?

A. Yes, sir, to Morton.

Q. Did you make a computation of the average cost of operation per ton per mile upon the Western division, for the fiscal year ending June 30, 1899?

A. Yes, sir.

Q. Did you make a computation of the average cost of operation per ton per mile upon the Minneapolis, New Ulm & Southwestern division for the same period?

A. Yes, sir.

Q. Did you also make a computation of the average cost of operation per ton per mile covering that portion of the line between Minneapolis and Hopkins?

A. No, sir. The reason I did not was because the accounts are not kept separate for that portion of the line. The line is divided into accounting divisions, and the earnings and expenses of these other divisions are kept separate, but for that portion of the line they are not.

Q. Now, Hopkins, you say, is about nine miles from Minneapolis station?

A. Yes, sir.

Q. Where are the terminal facilities, the greater part of the terminal facilities, the yards, shops, round-houses, etc., of the Minneapolis & St. Louis Railroad Company situated in relation to Minneapolis and Hopkins?

A. They are right on this nine miles of line between Minneapolis and Hopkins.

Q. How many tracks has the Minneapolis & St. Louis Railroad Company between Minneapolis and Hopkins?

A. They vary from two to sixteen. They have a double track for through trains the entire distance; and then there are numerous side tracks. I understand there are as many as sixteen tracks in one place. All the yards are in there.

68 Q. Hopkins, then, is practically one end of the Minneapolis terminal yards, isn't it?

A. Yes, sir, virtually.

Q. And Minneapolis is the other one?

A. Yes, sir.

Q. How does the expense of operation and maintenance of the railroad between Minneapolis and Hopkins compare with the operation of other portions of the line?

A. Oh, it is very much heavier.

Q. Hopkins is really, so far as it may be called a station, a main-line station?

A. Yes, sir.

Q. And from there the Western division starts and extends to Morton?

A. To Morton.

Q. What was the average cost of operation per ton per mile during the fiscal year ending June 30, 1899, upon the Western division, including all kinds of merchandise?

A. 1.293 cents.

Q. What rate per ton per mile revenue would be returned to the company under the rate fixed by the commission for operation upon the Western division?

A. It would be .779 of a cent.

Q. How much more per ton per mile would the cost of operation upon the Western division be than the revenue, under the rate fixed by the commission, basing your computation upon the business of the fiscal year ending June 30, 1899?

A. It would be .514 of a cent per ton per mile.

Q. The net loss, then, per ton per mile, resulting from operation under the commission's tariff would be something over half a cent?

A. Yes, sir.

Q. What was the average cost of operation per ton per mile of the Minneapolis, New Ulm & Southwestern division for the fiscal year ending June 30, 1899?

A. 3.962 cents.

69 Q. It would lack, then, only .038 of a cent of being four cents per ton per mile—cost of operation?

A. Yes, sir.

Q. What would be the revenue per ton per mile for the business over the Minneapolis, New Ulm & Southwestern division, at the rate fixed by the railroad and warehouse commission, using the business of the fiscal year ending June 30, 1899, as the basis?

A. Of course in that revenue I did not use the fiscal year; I simply took the rate established by the commission.

Q. Oh, yes; I was thinking of something else.

A. The rate per ton per mile allotted to the Minneapolis, New Ulm & Southwestern, under the thirty per cent. basis, would be 2.103 cents.

Q. What would be the net loss, then; or, putting it in another way, how much would the expense of operation exceed the revenue under the commission's rates?

A. 1.859 cents.

Q. Where are these points or stations named in Schedule B, commencing at Hopkins, located—upon which division?

A. Those located on the Western division are Minnetonka, Deephaven, Excelsior, Waconia, Young America, Norwood, Hamburg, Green Isle, Arlington, Gaylord, Gibbon, Fairfax, Franklin, Morton—these are located on the Western division. Those located on the Minneapolis, New Ulm & Southwestern are Winthrop, Lafayette, Klossner and New Ulm.

Q. Now, upon what division are the other stations—Redwood——

A. Redwood, Delhi, Belview, Echo, Wood Lake, Hanley Falls, Hazel Run, Clarkfield and Boyd are located on what is known as the Pacific division.

Q. What is the Pacific division?

76 A. It extends from Morton, Minnesota, the terminus of the Western division, to Watertown, South Dakota.

Q. When did the Minneapolis & St. Louis Railroad Company acquire ownership of what is now known as the Pacific division, extending from Morton to Watertown?

A. On February 20, 1899.

Q. Prior to that time was it owned by another company entirely?

A. Yes, sir.

Cross-examination.

By Mr. O'BRIEN:

Q. Mr. Nay, how long have you been auditor of the Minneapolis & St. Louis Railroad Company?

A. Since May 1, 1899.

Q. Prior to that time were you connected with the road?

A. I was connected with the St. Louis Southwestern Railway Company.

Q. With headquarters where?

A. At St. Louis, Missouri.

Q. Is that road a part of what is known as the Minneapolis & St. Louis system?

A. No, sir, it has no connection with it whatever.

Q. And your first acquaintance with the Minneapolis & St. Louis road was when you took the position of auditor, last May?

A. Yes, sir.

Q. Have you any knowledge of the actual condition of the road itself? Have you been over the road?

A. Yes, sir.

Q. Sufficiently to familiarize yourself with it?

A. Well, not to familiarize myself with it. I have been over the road.

Q. Now, you speak of the capital stock, bonded indebted-

71 ness, etc., of the Minneapolis & St. Louis system. The capital stock, you say, is $10,000,000?

A. Yes, sir.

Q. Now, what do you include in the Minneapolis & St. Louis system which has a capital stock of the amount?

A. I include the line from Minneapolis, Minnesota, to Angus, Iowa——

Mr. CLARKE: Where is Angus, Iowa?

WITNESS: Angus, Iowa, is the junction of the Minneapolis & St. Louis with the Chicago, Rock Island & Pacific; the terminus of what is known as the main line.

Q. And is situated about how far from the northern boundary of Iowa?

A. It is about 140 miles from the boundary.

Q. From the State line?

A. About that. The length of the line from Minneapolis to Angus is about 259.90 miles. Then the line from Hopkins, Minnesota, to Watertown, South Dakota, 215.42 miles. A small branch from Kalo junction, Iowa, to Kalo, 1.46 miles. A branch from Manitou junction, Minnesota, to Tonka bay, Minnesota, 1.45 miles. From Winthrop, Minnesota, to New Ulm, 20.22 miles. Then the line from Minneapolis to Hopkins, a little over nine miles, is a double track.

Q. A double track, and, as you said a while ago, there are sixteen tracks at some places?

A. Yard tracks, yes, sir.

Mr. CLARK: Perhaps it is not in the records. The Minneapolis, New Ulm & Southwestern division, which was formerly the Minneapolis, New Ulm & Southwestern Railroad Company, extends from Winthrop to New Ulm?

A. Yes, sir. The capital stock is the stock that was out-
72 standing June 30, 1899, and at that time the line from Winthrop to New Ulm was a part of the Minneapolis & St. Louis railroad.

Q. Now, the capital stock that you have given represents the entire capital stock for this entire system which you have just described?

A. Yes, sir.

Q. And the amount of bonded indebtedness—$17,800,000—represents the entire bonded indebtedness that is now a lien upon the road and its branches?

A. Yes, sir.

Q. When you speak of the Western division of the Minneapolis & St. Louis road, what do you mean?

A. I mean the line extending from Hopkins, Minnesota, to Morton, Minnesota.

Q. What do you designate the line from Morton, Minnesota, to Watertown, South Dakota?

A. It is the Pacific division.

Q. The line from Hopkins to Watertown is operated as one continuous line, is it not?

A. One continuous line separated into two divisions.

Q. The trains from Hopkins to Watertown are through trains, are they not?

A. The passenger trains are.

Q. Are the freight trains?

A. The freight trains are not; they change at Morton. Even the passenger trains change engines at Morton, some of them.

Q. Well, they change engines at Morton, yes; on all long runs the engines on trains are changed, are they not?

A. Yes, sir.

Q. But, with the exception of the necessary changes because of the length of the road, that line is operated as one continuous line, is it not?

A. Yes.

Q. And all shipments which originate at any point upon the Western division and are intended for any point upon the
73 Pacific division are carried through without change of cars, are they not?

A. Yes, sir. I would not say all of them, because some may be transferred.

Q. In making your computation as to the cost per ton per mile for the hauling of freight, what have you done? How did you make that computation?

A. I will explain first that the road is divided into six accounting divisions, and the earnings and expenses of those accounting divisions are kept as entirely separate and distinct as if they were different railroads, for accounting purposes and for the purpose of giving information to the general manager as to the results from operation of each particular section. Then arriving at the cost I have simply taken the expenses of that division and have allotted to freight traffic such a proportion of the total expenses of the division as the freight earnings of that division are a portion of the total earnings of the division.

Q. In getting at the expense of operating that division, what do you take into account? Or, have you simply taken the report that had already been made as to the expense of operating the Western division?

A. I have taken the report that had already been made.

Q. Now, how was that report arrived at?

A. Well, I have a list of the operating expenses—if you care for those. (Referring to a pamphlet.) I have last year's report, which varies vary imperceptibly from this year's report.

Q. Well, I suppose the system is the same; the amounts of the items are not the same, but the same items are included?

A. Yes, sir. I have not the detail with me, but I could furnish that. The first classification is maintenance of way and
74 structures. And under that heading is: Repairs of roadway; bridges and culverts; cross-ties, renewal of; rails; buildings and fixtures; fences, crossings, signs and cattle guards; repairs, telegraph; stationery and printing; superintendence. Then the next general subdivision is maintenance of equipment, under which are the following items: Locomotives, repairs and renewal of; passenger cars, repairs and renewal of; freight cars, repairs and renewal of; work cars, repairs and renewal of; shop tools and machinery, repairs and renewals of; stationery and printing; superintendence;

other expenses. There are two other subdivisions, conducting transportation, and general expenses. Under conducting transportation, there are the following subheadings (which are classified): First, locomotive service—engine and round-house men; fuel for locomotives; water supply for locomotives; lubricants for locomotives; other supplies for locomotives. Second, train service—conductors, baggagemen and brakemen; train supplies and expenses. Then casualties—wrecking; loss and damage; injuries to persons. Then station service—switchmen, flagmen, and watchmen; telegraph expenses, operating; station supplies; station agents, clerks and laborers; terminal expenses. Then other expenses which are termed contingencies—foreign agencies; advertising; traffic expenses; car mileage; rent of buildings and other property; stationery and printing; superintendence. Then the fourth general heading is general expenses, under which are the following items: Salaries of officers; salaries of clerks and attendants; general office expenses and supplies; legal services and expenses; insurance; stationery and printing; incidentals.

75 Q. In the majority of instances, it is possible to get at exactly the proper amount which should be charged to the expense of operating any division, is it not?

A. Yes, sir.

Q. For instance, under the heading "Maintenance of way and structures," it is apparent that the items referred to there are for expenses that were actually incurred upon that particular division?

A. Yes, sir. Almost every item under that heading can be directly located.

Q. There is no question of apportionment or anything there at all?

A. No, sir.

Q. Now, "Maintenance of equipment;" some of the items are of that character, are they not? For instance, a locomotive would remain on one division?

A. Yes, sir.

Q. While cars, either passenger or freight cars, would not, they would be transferred from one division to another?

A. Yes, sir.

Q. Should tools and machinery and repairs and renewals of them also belong to that division?

A. No, the greater portion of that expense is prorated among all divisions.

Q. That is one of the expenses that is prorated?

A. That is one of the expenses that is prorated.

Q. "Stationery and printing," "Superintendence," and "Other expenses," would also be prorated, would it not?

A. Yes, sir, the majority of them.

Q. Under the head of "Conducting transportation," locomotive service, engine and round-house, men, fuel for locomotives, water supply for locomotives, lubricants for locomotives, and "Other supplies for locomotives," would all be easily ascertainable

76 as to the exact amount spent upon that particular division; would they not?

A. Yes, sir.

Q. Train service: conductors, baggagemen and brakemen, how about that item?

A. That can be easily located.

Q. Train supplies and expenses; could that item be definitely ascertained?

A. In cases of that kind, where a conductor runs over two divisions, those items are usually divided on the mileage of the two divisions; if he runs a hundred miles on one and a hundred on the other, half would be changed to one and half to the other.

Q. So that can be ascertained exactly?

A. Yes, sir.

Q. Now, casualties; is each casualty charged to the division on which it occurs?

A. Yes, sir.

Q. Station service; switchmen; flagmen and watchmen. There is no apportionment in that case; that is charged directly?

A. No; that is charged directly. The only case of apportionment would be, say, at Hopkins, at Morton—the junction stations of two divisions; the employees at those stations would be divided as to expense.

Q. Now, "station service," wouldn't the only expense which would have to be apportioned between differen parts of the road be terminal expense?

A. Well, practically all. As I just said, there are some expenses at these joint stations, the junctions of two accounting division—nearly all expenses at those stations have to be divided between the two divisions.

Q. Now, the last classification of expenses, general classification; all of those are apportioned, are they not?

A. Practically all, yes, sir.

77 Q. Practically all of those are apportioned between the different lines. Assuming, then, that in the instances where you have mentioned that the general expenses of operating the entire system have to be apportioned, and are correctly apportioned, the expense and cost of operating any particular division of the road can be ascertained to a certainty?

A. Yes, sir.

Q. Now, you have stated what was the cost per ton per mile for the carriage of freight on the western division, and have arrived at the expense of operating that division in the manner in which you have testified to here?

A. Yes, sir.

Q. What credit have you given the division, of the freight carried? In other words, what earnings have you taken into consideration for that division?

A. Earnings on all business that passed over the division.

Q. What was the amount of business which terminated on the divison?

A. I haven't the figures with me to show the amount of business that termininated on that division.

Q. How much business originated on the division?

A. I have not the figures with me to show that.

Q. Can you give us any idea of the number of tons of freight which originated north of Hopkins and which terminated above the western or Pacific division, upon that entire line?

A. Not from memory. Those things are not ground into my memory yet.

Mr. CLARKE: You have a record of it at the auditor's office?

The WITNESS: I have a record; I can furnish the information.

Q. Have you allowed, as a part of the earnings of the western division, any amount for freight which neither arose nor terminated upon the western division?

78 A. Yes, sir. For instance, if freight originated at Minneapolis, which would be on another division, and passed to Watertown, where this division would be intermediate, it receives its proportion.

Q. You have made allowances for that?

A. Yes, sir.

Q. How much have you allowed?

A. The average mileage *pro rate*——

Q. Well, what rate?

A. Well, there are various rates; they are on various commodities. The actual earnings, for example, from Minneapolis to Watertown, South Dakota, are divided among the three divisions, Minneapolis to Hopkins, Hopkins to Morton, and Morton to Watertown, South Dakota; the actual amount of earnings received on that business.

Q. And you have allowed a *pro rata* amount to the western division for all that freight?

A. Yes, sir. It received its *pro rata* for every pound that was hauled over the division or any portion of it.

Q. Have you computed the amount of the earnings from freight hauled of that branch of the Minneapolis & St. Louis system extending from Hopkins to Watertown?

A. No, sir. That is—I have computed it, yes, but I haven't the figures with me.

Q. Well, will you produce those figures?

A. Yes, sir. I had better take a memorandum of that. That is the line from Hopkins to Watertown.

Mr. CLARKE: Consisting of the two divisions.

WITNESS: Yes, sir.

Q. Will you also produce the cost of operation of the Pacific division?

A. I understand you want the same figures for the Pacific division that I have given for the western.

79 Q. The same for the Pacific division that you have given for the western division. Hopkins is a station nine miles from Minneapolis, is it not?

A. Yes, sir, about nine miles.

Q. And has how many inhabitants?

A. I don't know.

Q. Do you know the number of tons of freight which was hauled by your road to Hopkins during the fiscal year ending June 30, 1899?

A. I have a record of it.

Mr. CLARKE: Do you mean that stops there or that passes through? Everything that goes over our line goes through Hopkins. You mean local for Hopkins.

Mr. O'BRIEN: I meant destined for Hopkins.

Q. Hopkins is a very small place, is it not?

A. It is not a very large place.

Q. Well, is Minnetonka a large town?

A. The station is Tonka Bay. No, sir. Minnetonka Mills you probably refer to?

Q. Well, there is a station here marked "Minnetonka," that is all I know.

A. Well, that is it. It is a small place.

Mr. CLARKE: That is Minnetonka Mills.

WITNESS: It is just this side of the lake; a small place.

Q. Deephaven is simply a station on the lake?

A. Yes, sir.

Q. A small resort. Excelsior is a village on Minnetonka?

A. Yes, sir.

Q. About how many inhabitants?

A. I don't know; quite a little village.

Q. Well, can you give us the amount of freight which was destined for Excelsior, hauled by the road, during the year that you have been referring to?

A. Yes, sir.

Q. What I would like, Mr. Nay, is to have you testify as to
80 the amount of freight destined for those different stations, to show their relative importance.

A. I can furnish that information.

Q. Particularily as to the stations on the western division; Waconia, Young America, Norwood, Hamburg, Green Isle, Arlington, Gaylord, Gibbon, Fairfax, Franklin, and Morton.

A. You want the points on the western division, then?

Q. Yes. Now, without taking the time to ask you specifically, are you prepared to give the cost of the operation of the other divisions besides the western division, at this time, and the earnings of those different divisions?

A. Yes, sir. That is, not to give it here, but it is all worked up every month.

Mr. O'BRIEN: I shall want to ask Mr. Nay the same question with reference to all the divisions as well as the western division and show the amount of freight hauled on those different divisions to different points. I suppose he is not prepared to give that now.

Mr. CLARKE: No. We have not the slightest objection to giving

that information, so far as I know. If it can be done without too much trouble we are glad to give you any information we can, Mr. O'Brien. We will give you the information as to that.

The taking of testimony was at this point suspended, to be resumed at 10 a. m., August 23, 1899, at which time the following testimony was introduced:

FRANK NAY, recalled, testified as follows:

Examined by Mr. CLARKE:

Q. Mr. Nay, I will ask you if since yesterday's session you have made an estimate of the cost per ton per mile of handling freight on the Pacific division for the fiscal year ending June 30, 1899?

A. Yes, sir.

81 Q. What is it?

A. 3.184 cents.

Q. The Pacific division, you testified yesterday, is the extension from Morton to Watertown, South Dakota—from Morton, Minnesota?

A. Yes, sir.

Q. And is the next division lying west of what is known as the western division?

A. Yes, sir.

Q. On cross-examination yesterday you were questioned relative to the credits given the different divisions in making up the statement of earnings. Now, if I understand you rightly, if a car-load or a shipment originates on one division and passes over part of that division and part of another division, you credit each division over which it passes with earnings according to the mileage?

A. Yes, sir, we credit according to the exact mileage with one or two exceptions. The St. Paul division, being a very short division, only ten miles long, is allowed fifteen per cent. of the earnings, the same as the New Ulm is allowed thirty per cent.; but outside of that the division is on actual mileage basis.

Q. But, what I am getting at is this; if a shipment passes over a part of two divisions, each division is credited with its proportionate part of the earnings?

A. Yes, sir. If it passes over three divisions, each one of the three is.

Q. And if a shipment originates on one division, passes entirely over a second and reaches destination on a third, all three of them get their proportionate share of the earnings?

A. Yes, sir.

Q. Speaking of the St. Paul division, what is the cost per ton per mile for handling freight on the St. Paul division for the last fiscal year?

A. 5.840 cents.

82 Q. What is the St. Paul division?

A. From St. Paul to Minneapolis.

Q. You testified yesterday as to the gross earnings of the whole system, including lines within the State and lines without the State, including local business and interstate business. What percentage

or proportion of the earnings of the Minneapolis & St. Louis Railroad Company is earned upon local business? By that I mean business local to the State of Minnesota, originating and terminating within the State.

A. We have compiled no accurate statistics showing that, but I have made an investigation as best I could, and my judgment is that the local business is less than twenty-five per cent. of the entire business.

Q. Less than twenty-five per cent.?

A. Yes.

Q. Do you think that is a conservative and fair estimate?

A. That is a conservative and fair estimate. It might run lower. In one way it is superficial, but in another way it is fair, and I feel certain that it would run less than twenty-five per cent.

Q. How did you make that investigation?

A. I took the month of June, 1899, and took off the local tonnage between all stations within the State of Minnesota, and made an allowance for business to junction stations which is rebilled and goes outside of the State of Minnesota and also business from junction stations which comes from outside the State of Minnesota, and by that means found that the strictly Minnesota business would be less than twenty-five per cent. of the total.

Q. So that the estimate you made is from the actual business of the month of June, 1899?

A. Yes, sir.

Q. Well, now, what do you say as to that being an average business month—a fair month?

83 A. I think perhaps it is about as fair a month as we could take. I didn't give that as much thought, perhaps, as I should have before taking the month of June, but now I believe it is really a very fair month, because the grain business was quite heavy during the month of June for a summer month, and of course there is a great deal of grain in the State of Minnesota, and the merchandise business being about an average for the year, I think that it is a fair month to take.

Q. You made this from an examination of the actual shipments as shown by the waybills?

A. Actual shipments that were taken into our account, represented by what were reported as freight earnings for that month.

Q. And upon that you base your judgment that the business local to the State is not to exceed twenty-five per cent. of the whole business——

A. Not to exceed twenty-five per cent. of the total freight earnings.

Q. You are familiar with the method of handling freight over railroads—making shipments, the routine?

A. Yes, sir.

Q. I suppose every shipment has to be billed, does it not?

A. Yes, sir.

Q. Whether the shipment is large or small, or whether the haul is long or short, each shipment has to be billed?

A. Each shipment has to be waybilled.

Examined by Mr. O'BRIEN:

Q. Mr. Nay, can you give us the process by which you arrived at your conclusion with reference to the average cost per ton per mile on freight on the Western division?

A. Yes, sir. I took first the total operating expenses as shown by the books which are chargeable to the Western division——

84 Q. Amounting to how much?

A. Amounting to $219,266.13. Then I took the taxes on the gross earnings for that division, amounting to $19,120.82. Those taxes are arrived at by taking three per cent. of the gross earnings and adding the internal-revenue tax revenue stamps. I then took the interest on the bonded debt, taking such a proportion of the total interest on the bonded debt as the mileage of the Western division is a portion of the total mileage. That is, in taking that mileage I took the average miles operated during the year. The mileage changed. At the beginning of the year the miles operated was 509; the average mileage during the year being 416.54. I found what percentage the mileage of the Western division was of 416.54, and took such a portion of the total interest on bonded debt. That interest is $147,077.42. I then arrived at the proportion of the dividends paid on stock in the same manner as the interest on bonded debt, which gave $65,692.08, making a total of $451,156.45. From that total I deducted a portion of the interest and exchange, which is arrived at on the same basis that was used in connection with the interest on bonded debt and dividends on stock, amounting to $4,222.77, and a portion of the interest on investments, arrived at in the same manner, $5,787.39, making the total to deduct, $10,010.16, leaving a net cost of $441,146.29. The gross earnings for that division for that period was $603,554.72. The freight earnings were $475,771.83, or 78.83 per cent. of the gross earnings. I then took 78.83 per cent. of the net cost mentioned above as chargeable to freight business, which gave $347,755.62. The total tons one mile for that period were 26,901,460, and by dividing that into the

85 proportion of cost of operation chargeable to freight gives 1.293 cents per ton per mile.

Q. That is for the Western division?

A. For the Western division.

Q. What was the highest rate per ton per mile which was charged during that period upon any freight hauled on that division?

A. Our records are not kept in such a manner as to show that. The general freight agent's records would show that rate.

Q. Well, as a matter of fact, different classes of merchandise or of freight pay different rates, do they not?

A. Per ton per mile, yes, sir.

Q. And some of the rates are very much higher than the average rate that you have given here?

A. Than the average cost.

Q. Than the average cost?

A. I presume so.

Q. In fixing a tariff, what considerations are taken into account?

A. Well, I could not answer that, as we do not fix the tariffs, the general freight department makes the tariffs.

Q. And you know nothing about that?

A. I don't know what basis they use.

Q. Are you able to state the number of tons of hard coal in carload lots which were hauled on the Western division of the Minneapolis & St. Louis road during the year ending June 30, 1899?

Mr. CLARKE: We will prove that by the general freight agent.

Q. Will you please state again what the gross earnings for freight were on the Western division?

A. $475,771.83.

Q. And just give me the total cost again.

A. Do you mean the total cost or the proportion chargeable to freight?

86 Q. I mean the proportion chargeable to freight.

A. $347,755.62.

Q. And in that is included the amount paid as dividends upon stock?

A. Yes, sir.

Mr. CLARKE: I will say there that no dividends have ever been paid on common stock. That is correct, isn't it, Mr. Nay?

WITNESS: Yes, sir.

Q. Now, will you please give the same information with regard to the other divisions?

A. Do you mean the average cost per ton per mile?

Q. Yes, and give the process in each case.

A. They are all arrived at on the same basis, with two exceptions.

Q. Well, you might give the ones that are arrived at on the same basis, first, give the results, and then you can give the exceptions. Maybe I can get what I want easier this way; take the Pacific division.

A. The Pacific division is one of the exceptions.

Q. Well, leaving Minneapolis and going south, how is that line divided?

A. The first division is from St. Paul to Minneapolis.

Q. That is not one of the exceptions?

A. No, that is not one of the exceptions. That is arrived at on the same basis. The cost per ton per mile on that division for the year ending June 30, 1899, was 5.840 cents. The next division is known as the Albert Lea division.

Q. Well, now, let me ask you, before you go any further; there is practically no local freight on that first division, is there?

A. No, sir.

Q. You mean there is none?

A. Practically no local freight on that division.

87 Q. So that its effect on the general question is infinitesimal; the rate per ton per mile on that division really cuts no figure?

Mr. CLARKE: Well, that is a matter for the court, perhaps, and not for Mr. Nay.

Q. Well, is there any local freight on that division?

A. I think there is none. I would not be positive as to that.

Q. How did you arrive at the cost per ton per mile?

A. If there is any local freight it is between St. Paul and Minneapolis; there is no local freight at any intermediate point.

Q. I know, but if there is no local freight, how did you arrive at the cost per ton per mile—what it would be if there had been any freight?

A. No, on freight hauled through.

Q. From St. Paul to Minneapolis?

A. From St. Paul to Minneapolis, passing, say, from St. Paul to Hopkins and to these various stations out on the line; the St. Paul division gets its proportion of the earnings on those shipments, and of course it is charged with its proportion of the expenses.

Q. Well were there any number of tons of freight on that division which could be considered local to that division? That is, freight simply from St. Paul to Minneapolis, or *vice versa?*

A. I couldn't answer that without further investigation of our books.

Q. The records you have here show nothing?

A. This record here simply shows the total freight earnings; and, as I said before, the total freight passed over the St. Paul division between St. Paul and Minneapolis, whether the destination was St. Paul or Minneapolis or beyond either or both of these points—all business is included that passes over the rails.

88 Q. Now, the conditions surrounding the haul from St. Paul to Minneapolis are such that it would necessarily be more expensive to operate trains than it would be in other portions of the road?

A. Yes.

Q. And the expense of maintaining that division is largely in excess of maintaining any similar distance in other portions of the road?

A. Yes.

Q. The terminals are included in that division, are they not—the terminals at this point?

A. The terminals at St. Paul and a portion of the terminals at Minneapolis.

Q. Well, now, the next division in your line is what?

A. Is what is known as the Albert Lea division, extending from Minneapolis to Albert Lea, both in Minnesota.

Q. And what is the distance?

A. It is about 108 miles. The average cost per ton per mile on that division is .704 of a cent per ton per mile.

Q. What was the gross tonnage on that division during that year?

A. 89,524,755 tons per mile.

Q. That is for one mile?

A. For one mile.

Q. For a haul of one mile?
A. Haul of one mile.
Q. And what were the total freight earnings?
A. $906,939.68.
Q. And what was the proportion of the cost of operating that division, chargeable to freight earnings?
A. $631,040.61.
Q. Now the next division?
A. The next division is what is known as the Southern division, extending from Albert Lea, in Minnesota, to Angus, Iowa. The cost per ton per mile on that division, for the year ended June 30, 1899, was 1.425 cents.
Q. What was the total tonnage for one mile?
A. 34,797,490 tons per mile.
89 Q. And the total freight earnings?
A. $376,755.98.
Q. And the total cost properly chargeable to freight?
A. $496,114.60.
Q. In all of those computations you have figured upon the same basis as you stated you did with regard to the Western division?
A. Yes, sir.
Q. Now the branch from Winthrop to New Ulm, formerly the Minneapolis, New Ulm & Southwestern railroad?
A. Well, my figures for that comprise the entire year. For eight months it was operated separately and for four months as a part of the Minneapolis & St. Louis. The cost per ton per mile on that branch was 3.962 cents. This is one of the exceptions. In arriving at the cost, I have not included any dividends, because the greater portion of the year it was operated separately and there was a deficit, and I did not think it proper to charge any portion of the dividends to that division.
Q. Is that a division, or what do you call it?
A. A division, yes, sir; the Southwestern division.
Q. Now, what was the total tonnage on the Southwestern division?
A. 675,831 tons one mile.
Q. And the total cost?
A. Chargeable to freight, $26,779.78.
Q. And the total freight earnings?
A. $21,715.19.
Q. Now, the Pacific division.
A. The Pacific division, the average cost per ton per mile for the year ended June 30, 1899, was 3.184 cents. And this is another of the exceptions. This division was operated separately from July 1, 1898, to February 19, 1899, at which time it passed into the possession of the Minneapolis & St. Louis, and from that time it
90 was operated as the Pacific division. Now, in arriving at the total cost for that division, I have included only $38,148.55 as dividends on stock, which is what I have considered its proportion since it passed into the hands of the Minneapolis & St. Louis. On a mileage basis the dividends for the whole year, if the same

rate had been paid, would amount to $150,000 or $160,000, but I have included only $38,148.55.

Q. Well, have any other matters been taken into consideration—any other difference considered?

A. No other difference. The only exceptions are the Southwestern and Pacific——

Q. I know, but in the Pacific division have there been any other changes made in the manner of computations or method?

A. No, sir.

Q. Do your estimates for that division cover the entire year, or only since the period it passed into the hands of the Minneapolis & St. Louis?

A. No, they cover the entire year.

Q. Had you access to the books and earnings of the company for the time before it passed into the hands of the Minneapolis & St. Louis?

A. Yes, sir, they were kept in my office.

Q. Well, now, what was the total tonnage on that division during that year?

A. 9,414,681 tons per mile.

Q. And what was the total cost chargeable to freight?

A. $299,728.83.

Q. And the total freight earnings?

A. $203,006.92.

Q. Prior to the time that the Pacific division became a part of the Minneapolis & St. Louis was that road operated independently?

A. Yes, sir.

91 Q. And had an independent set of officers?

A. Yes, sir.

Q. And independent equipment?

A. Yes, sir, a small amount of equipment.

Q. So that the cost of operating that piece of road has largely decreased since it has become a part of the Minneapolis & St. Louis system; there are some salaries that are no longer paid, and matters of that sort?

A. Yes, but to offset that a portion of the salaries of officers of the Minneapolis & St. Louis are paid by it.

Q. In other words, the cost per ton per mile for freight hauled upon that road now would be less than it must have been during the time that the system was independent of the Minneapolis & St. Louis system—before the Minneapolis & St. Louis had acquired that piece of road?

Mr. CLARKE: Don't state any conclusion, Mr. Nay; state what you know.

A. Well, I don't know.

Q. You don't know about that. So you are not able to say that an estimate of the cost of hauling freight upon the Pacific division based upon the expenses of that division prior to the time it became the property of the Minneapolis & St. Louis road is a correct basis as to what the present cost is?

A. I don't know as I quite understand that question.

Q. You are unable to say whether or not the operating expenses of what is now known as the Pacific division of the Minneapolis & St. Louis road have been lessened because of its having come under the direct jurisdiction and ownership of the Minneapolis & St. Louis road?

A. No.

92 Q. And the figures that you have given as to the cost of hauling freight upon that division are based upon the operating expenses as they were before that piece of road was owned by the Minneapolis & St. Louis road?

A. No, sir.

Q. Well, haven't you taken into consideration the operating expenses for the year ending June 30, 1899?

A. Yes, sir.

Q. And how long during that year was this piece of road owned by the Minneapolis & St. Louis?

A. It was owned from February 20 to June 30.

Q. And prior to that time it had been operated as an independent road?

A. Yes, sir.

Q. Now, as to whether the cost of hauling freight on that road was lessened or not by the consolidation, you don't know?

A. No.

Q. Therefore you are not able to state that your estimate of the cost of handling freight upon that road is correct as at the present time?

A. Yes, I am. The——

Q. Well, if you can't tell whether it has cost more or less to operate that road now, how do you know?

A. I can't tell offhand, without examining the records, as to that point.

Q. Well, that is all I want to know; you don't know about that?

A. No.

Q. You have based your calculation upon a condition of things that existed last year, but does not exist now?

A. No, that is not true.

Q. You don't know whether the cost of operating what is now known as the Pacific division of the Minneapolis & St. Louis road has been decreased or not by reason of the change in management of that road which took place last February, do you?

A. No, sir.

93 Q. In giving the cost of carrying freight per ton per mile on that road, you have estimated that cost according to the expense of operating what is now known as the Pacific division during the year ending June 30, 1899?

A. Yes, sir.

Q. During all of that year prior to February, 1899, the Pacific division was operated as an independent system?

A. Yes, sir.

Q. If, as a matter of fact, the cost of operating that system has

been decreased by reason of the change in management which you have testified to, your estimate is not correct as to the present cost of operating that division, is it?

A. If it has decreased, of course the cost during the time that it has been under the present management would be less than before; but I don't know whether it has decreased or not.

Q. You don't know that it has decreased?

A. No.

Q. You don't know that it has not?

A. No.

Q. Therefore, you are not prepared to say at this time that this estimate of yours is a fair estimate as to the present cost per ton per mile of hauling freight upon that division?

A. I can only give it for what it is worth; it is for the year ended June 30, 1899—the actual cost for that year.

Q. Can you give us the average cost per ton per mile for carrying freight on the Minneapolis & St. Louis system?

A. On the entire system?

Q. On the entire system.

A. Yes, sir. It is 1.112 cents for the year ended June 30, 1899.

Q. How do you get at that?

A. I arrived at that by taking the total operating expenses, taxes, interest on bonded debt, dividends on stock, amounts paid for
94 trackage and other rentals, aggregating $2,532,522.60, and deducted therefrom receipts from interest and exchange, interest on investments, and trackage and other rentals received, amounting to $196,596.95, leaving a total net cost of $2,335,925.65. I found that the freight earnings were 74.41 per cent. of the gross earnings, and I took 74.41 per cent. of the net cost, which made $1,738,162.28, as chargeable to freight, and by dividing that by the total tons one mile ($156,379,613) gives 1.112 cents.

Q. You said yesterday that the entire Minneapolis & St. Louis system cost how much?

A. $23,390,560.15.

Q. Now, will you please tell us what items go to make up that cost?

A. Well, it is what was originally paid for the road and equipment of our present company.

Q. Do you mean at the time of the foreclosure?

A. At the time of the reorganization. Of course, as I say, I find this on the books. I know that it is the original cost, together with any additional items—there have been additional items of equipment purchased since, but those additional items are small.

Q. Well, can you give the history of the foreclosure proceedings and reorganization of that road which took place a short time ago?

A. No, sir.

Q. All that you know as to the cost of the road, then, is what appears from the books?

A. Yes, sir.

Q. Well, now, what appears there as the original cost? That

amount is not there as the original cost; you say there are some additions?

A. There have been some additions.

Q. Well, give us the original cost.

A. I haven't it separated here. The additions are comparatively small.

95 Q. In regard to this tonnage that you speak of, you couldn't tell us the different kinds of freight, the different classes of freight that were hauled? You haven't that classified?

A. Not for each division; no, sir.

Examined by Mr. CLARKE:

Q. Now, this cost you speak of was the amount which the books show as the cost of the property at the time of the reorganization of the present company?

A. Yes, sir; I presume so. As I stated, it is what appears on the books now; I haven't investigated further than that.

Q. The Minneapolis & St. Louis Railroad Company's property?

A. Yes, sir.

Q. Do you know the date of the incorporation of the present company?

A. Yes, sir. It was November 1, 1894.

Q. November 2, 1894.

A. Second? The first was Sunday, I suppose.

Q. Yes, November 2, 1894 Now, these other items that you speak of are items of property which have been purchased since that time, as shown by your books?

A. Yes, sir.

Q. You say the average cost per ton per mile for carriage of property over the lines of the Minneapolis & St. Louis Railroad Company, including the whole system, is 1.112 cents? Now, does that include all business, both through and local?

A. Yes, sir.

Q. And all business in traffic, both interstate and local?

A. Yes, sir; it covers every kind of business that was handled.

Q. And in making that computation you have included the cost of all kinds of traffic on all the divisions, both through busi-

96 ness and business local to the State of Minnesota, and every class and kind of freight?

A. Yes, sir.

Q. And the average cost of transportation for all that, you say, is 1.112 cents per ton per mile?

A. Yes, sir.

Q. Now, you say that the expense of transporting local traffic is greater than that of through traffic, in proportion?

A. Yes, sir.

Q. Does every shipment have to be billed?

A. Has to be waybilled, yes, sir.

Q. Is the haul as long on shipments local to the State as on interstate shipments?

A. No, sir.

Q. Are there as many full car-loads or more broken lots?

A. There are more broken lots on local business.

Q. What average revenue per ton per mile would you be afforded to the Minneapolis & St. Louis Railroad Company for the transportation of merchandise between St. Paul or Minneapolis and the points named in Schedule B, under the commissioner's tariff?

Mr. MILLS: We only make it on one article—hard coal; you say "merchandise."

Q. Well, the average cost per ton per mile, what revenue would there be at that rate?

A. That is under Schedule B?

Q. Yes; the commission's rates?

A. That is to all these stations?

Q. Yes.

A. It would be 1.118 cents.

Q. And that is hard-coal rate, one of the lowest-priced commodities carried, isn't it, covered by that schedule?

A. Yes, sir.

97 Q. And still even, if we were to include high-priced commodities, include everything—that rate would only yield a revenue of 1.118 cents per ton per mile?

A. Yes.

Q. A merchandise rate of a tariff identical with the one fixed by Schedule B for the carriage of hard coal, I understand, then, would yield a revenue to the Minneapolis & St. Louis Railroad Company of 1.118 cents per ton per mile; is that correct?

A. Only between those stations.

Q. Yes; the average, between those stations?

A. Between those stations.

Q. How much more is that per ton per mile than the average cost of transportation of merchandise over the whole line, including interstate and local business?

A. .006 of a cent.

Q. Now, Mr. Nay, I understand that in making up your estimate of the cost per ton per mile for the operation of the Southwestern division, that division has been given credit for the arbitrary of thirty per cent. on all merchandise passing over it, has it not?

A. Yes, sir.

Q. How much more credit does the Southwestern division receive under the division which you have adopted than it would earn on a mileage pro rate, approximately?

A. I should say at least fifty per cent. more.

Q. So that is the estimate you have made, the Southwestern division gets a credit of fifty per cent. more than the actual earnings on a mileage pro rate?

A. Yes, sir.

Q. And you say you have charged it with no dividend?

A. No, sir.

Q. On the other divisions you have included the dividends?

A. Yes, sir.

Q. Now, on what stock has dividends been paid?

A. On the first preferred and second preferred.

98 Q. The first preferred stock has been retired, has it not?

A. It was retired June 1st.

Q. And you have not included it in your capitalizations?

A. No, sir.

Q. Your statement that there was $10,000,000 of stock outstanding does not include the first preferred?

A. Does not include the first preferred.

Q. What was the amount of the first preferred?

A. $2,500,000.

Q. What dividends were paid on the second preferred?

A. There has been $180,000 paid on the second preferred.

Q. What percentage?

A. That would be four and one-half per cent.

Q. Four and one-half?

A. Yes, sir; two per cent. the first dividend and two and a half the second.

Q. Has any dividend ever been paid on common stock?

A. No, sir.

Q. Then the dividends you have charged up cover only the preferred stock?

A. Only the preferred stocks.

Q. None on common?

A. None.

Mr. O'BRIEN: How was the first preferred stock retired?

The WITNESS: By the issue of the same amount of bonds; $2,500,000 worth of bonds.

Mr. O'BRIEN: And what is the amount of the second preferred stock?

A. $4,000,000.

Mr. O'BRIEN: And $6,000,000 common?

The WITNESS: $6,000,000 common?

Mr. MILLS: Mr. Nay, you don't know anything about the tonnage of hard coal carried to the several stations that are mentioned in the order?

99 The WITNESS: I have no figures with me; I understand Mr. Hopkins has them.

W. M. HOPKINS, having been sworn, testified as follows:

Examined by Mr. CLARKE:

Q. You are the general freight agent of the Minneapolis & St. Louis Railroad Company, are you, Mr. Hopkins?

A. Yes, sir.

Q. How long have you been connected with the traffic department of the railroad?

A. About fifteen years.

Q. How long have you been general freight agent of the Minneapolis & St. Louis Railroad Company and its predecessor, the Minneapolis & St. Louis Railway Company?

A. About ten years.

Q. During all that time you have had to do with traffic and particularly upon the line and lines of this company, have you?

A. Yes, sir.

Q. You are familiar with the location of the road and the nature and character of the business and the location of the different stations, and, in a general way, with the service rendered in transporting traffic over the line of this company?

A. Yes, sir.

Q. How much hard coal was transported from Minneapolis to the points named in Schedule B, on the Western, Pacific and Southwestern divisions, during the year ending June 30, 1898?

A. Beginning at Norwood, 34 tons; Hamburg, none; Green Isle, none; Arlington, 74½; Gaylord, 30; Winthrop, 143; Lafayette, 39; Klossner, blank; New Ulm, 526½; Gibbon, 115; Fairfax, 340; Franklin, 160; Morton, 270; Redwood, 143; Delhi, blank; Belview, 44½; Echo, 195; Wood Lake, 42½; Hanley Falls, blank; Hazel Run, 75; Clarkfield, 169; Boyd, 12; total, 2,403 tons.

100 Q. Which of these stations are upon the Southwestern divisio n, formerly known as the Minneapolis, New Ulm & Southwestern railroad?

A. The stations of Klossner, Lafayette and New Ulm.

Q. What is the first station going west on the Pacific division?

A. Morton.

Q. The stations following Morton are west of Morton, in the list you have given?

A. Yes, sir.

Q. And would be on the Pacific division?

A. Yes, sir.

Q. What is the first station west of Winthrop, on the Western division?

A. Gibbon.

Q. And all stations between Gibbon and Morton are on the Western division?

A. Yes, sir.

Q. What is the total tonnage given by that list which you have, for that year?

A. The total of the figures which I have given?

Q. Yes.

A. I have not figured it up.

Q. Well, how many tons and about how many car-loads would that be?

A. Approximately 134 car-loads. (Having footed up the list.) I use the basis of 18 tons per car-load. If the average car-load would be heavier than that, the number of car-loads would be less.

Q. What do you suppose is the average number of tons to the car?

A. I can only state approximately. From 15 to 18 tons. That would vary according to the line transporting it, the size of the equipment used, and the points between which the coal was transported.

On through business the average per car would be less than on business between points like Duluth and St. Paul, for instance.

101 Q. And that would make, all together, about how many car-loads of coal?

A. I should say approximately 134 car loads.

Q. During the whole year?

A. Yes, sir. I have used an estimate of 18 tons per car-load, which I think is quite high.

Q. Now, how are shipments of that kind made, in car-loads or train-loads or part car-loads, or how?

A. They are made in car-loads and train-loads, too, if we can get sufficient to transport.

Q. Well, I mean how are they in fact made to these points on our line?

A. Oh, in car-loads; single car-loads.

Q. No trains?

A. No, sir.

Q. Single cars, taken from what point? Minneapolis?

A. We receive them either at Minneapolis or Minnesota transfer.

Q. Minnesota transfer is between St. Paul and Minneapolis, is it?

A. Yes, sir.

Q. It is the point where cars are transferred between the different railway companies?

A. Yes, sir.

Q. A car of coal from Duluth, destined to any one of these points on the Southwestern division, being the Minneapolis, New Ulm & Southwestern, how is it handled, and how and where is it transferred?

A. We would receive it from the connecting lines at St. Paul, Minnesota transfer, or Minneapolis, and transport it over the St. Paul division, the main-line division, the Western division to Winthrop, then over the Southwestern division from Winthrop to New Ulm.

Q. About how many times would the car be transferred or switched and where?

A. It would have to be taken out of the train and put into another train at least three times; possibly four.

102 Q. At what points?

A. At Minneapolis, at Hopkins and at Winthrop.

Q. Is Winthrop a junction point?

A. It is a junction point between the Southwestern and Western divisions.

Q. How is the freight handled between Winthrop and New Ulm? Does it go out on the same train it leaves Minneapolis in, or is it transferred and put in another train?

A. It is transferred into another train.

Q. So that it has to be switched and put into another train at Winthrop?

A. Yes, sir.

Q. How about Hopkins?

A. The same is true of Hopkins.

Q. Hopkins is the junction point of the main line and the Western division, is it?

A. Yes, sir.

Q. So it has to be switched and handled once in the yard at Minneapolis, once at Hopkins and once at Winthrop?

A. Yes, and another time at the point of transfer from the connecting line—Minnesota transfer or St. Paul, as the case might be. So there would be at least three transfers from one train to another, and possibly four.

Q. Three transfers if delivered to the Minneapolis & St. Louis at the Minneapolis yards, and four transfers if delivered either at St. Paul or Minnesota transfer?

A. Yes, sir.

Q. What is a fair switching charge—I don't mean, now to ask you as to charge made by a transfer company which is organized specially for the purpose of transferring the cars of other companies, but a fair allowance to be made, in making a rate or tariff, for transfers like these, at the junctional points; a fair charge per car?

103 A. So far as our company is concerned, our switching charges have been fixed—I am speaking now of switching charges on the line locally, not switching charges in the cities covering the transfer of grain between elevators and mills, where they handle large quantities of it, but switching charges fixed at local stations on the line, have been fixed with a view of covering the cost of the service and not particularly with a view of deriving any revenue from that service; that is, they have been merely a nominal charge to cover the cost of the service; two dollars per car-load.

Q. This transfer of cars and switching at junctional points is an entirely additional service and expense from that rendered when a car is carried forward in a train?

A. Yes, sir. That, of course, would not cover the entire cost of transferring a car from one train to another.

Q. You think about 134 car-loads, then, would cover the whole business done in that year, figuring the cars at 18 tons per car?

A. Yes, sir, if you use that method for estimating car-loads.

Q. Now, are these cars billed separately?

A. Yes, sir.

Q. What is the longest haul between Minneapolis and New Ulm?

A. Do you mean by our line?

Q. Yes.

A. We only have one haul; that would be by the way of Winthrop. Oh, do you mean the distance?

Q. I mean the distance.

A. 88 miles.

Q. How many stations between Minneapolis and New Ulm to which we carried hard coal that year, as shown by that paper that you have there?

A. Six.

Q. Six within the distance of 88 miles?

A. If you include New Ulm it would be seven.

104 Q. But six between New Ulm and Minneapolis?

A. Yes, sir.

Q. What is the distance to Morton from Minneapolis?

A. 101 miles.

Q. How many stations between Minneapolis and Morton to which we carried hard coal that year?

A. Seven.

Q. Seven stations; not including Morton?

A. Yes, sir.

Q. What is the actual distance from Duluth to Minneapolis by the St. Paul & Duluth road?

A. 156 miles as shown by the chart or map used by the commission in this case, marked Exhibit A.

Q. Which expense is the greater in conducting transportation? The expense of local traffic, traffic local to the State and to local points, or through traffic?

A. Local traffic.

Q. Wherein is the difference?

A. The cost of service in rehandling, receiving, storing, and discharging goods, additional help required, fuel used, wear and tear of equipment and track in switching cars in and out of trains, the small tonnage per car as compared with the tonnage of through trains and through traffic, and the small number of cars per train as compared with through trains. One more item (it is a considerable one also) is the fact that your local trains must be run per schedule every day, but your through train need not be run unless you have traffic sufficient to warrant the running of the train. Very often if you have a limited number of through cars, insufficient to make up a train, you may abandon the through train, letting the freight rest on the side track until a later hour, or the following day,

105 until sufficient cars are accumulated to run a full through train over that division. The local service cannot be handled in that way. You have a certain schedule on which to run your local train every day, and you must run that whether it contains two cars or a full train of twenty or whatever your maximum train capacity is, so that your fixed charge is always present on your local train, regardless of the tonnage, while it may be avoided on your through train.

Q. In other words, you have got to run the local train anyway, whether there is any business for it or not?

A. Yes, sir.

Q. And whether the business is much or little?

A. Yes, sir.

Q. And you have got to stop at every local station and take traffic if there is any?

A. Yes, sir.

Q. Speaking from your own actual knowledge and experience as traffic manager of the Minneapolis & St. Louis Railroad Company, do these local shipments (I mean by that, shipments local in the State) usually consist of car-loads, or are they smaller, and about how

do they run? Just explain the average nature and character of shipments local in the State.

A. Traffic as a whole?

Q. Yes.

A. Oh, there are very many more less *than* a car-load shipments than there are car-lot shipments; a great many times over.

Q. Do the cars in which you handle the local traffic—does each car carry business destined for one station or for distribution to many stations?

A. As a rule, for distribution to many stations. One of the largest items of cost in transporting local traffic is the impossibility of loading cars to anywhere near their maximum capacity. For instance,

106 5,000 pounds is a good big average load for a local car—what we term a peddler, while on your through business 30,000 to 40,000 pounds, perhaps, would be an average.

Q. 5,000 pounds is a fair average, you say, for a car in the local freight traffic?

A. Yes, sir. If you can average 5,000 pounds on your local service you are doing well.

Q. Now, suppose a car engaged in local business contains shipments to several different points, the same car—is that a common occurrence?

A. Yes, sir.

Q. Does each one of these shipments have to be separately billed?

A. Yes, sir.

Q. So that no matter how many shipments one car carried, there would be a separate waybill for each shipment?

A. Yes, sir, and a stop has to be made at each one of the stations that an item of freight is billed to, no matter whether the revenue in that item amounted to fifty cents or a dollar; you must stop your car at the platform, take out your box or whatever the local item is, in contradistinction to your through train, where, if you have no freight for that station, you don't stop your train there; it goes through.

Q. Is there any difference in making the billing for one box of shoes, on which you might get 25 cents, and of a car-load of wheat or coal, on which you might get as many dollars or more?

A. No, sir, it would cost as much to run that car through to the ultimate point of destination, with that one box of shoes in, on which you might earn 75 cents—practically cost as much to transport that case of shoes as it would to transport a car-load of wheat for the same distance, on which we might earn sixty or seventy dollars.

Q. What in your opinion would be a fair relation to estab-

107 lish as to the cost of transportation of local traffic and that of through traffic?

A. Well, that is a pretty hard question to answer, Mr. Clarke.

Q. Well, give us your best judgment and opinion. Make it conservative.

A. It would depend on circumstances. Handling a large volume of through business and a small comparative amount of local business, the cost, of course, would be less in proportion. If your earn-

ings consist very largely of revenue from your local traffic and the volume of through business is small, of course the proportion would be reversed.

Q. Well, take the Minneapolis & St. Louis Railroad Company, your own company, and your own acquaintance with its business; how much more, if any, in proportion, in your judgment, would the cost of transporting a given tonnage and peddling it out at local stations or on local trains be, than the cost of transportation of through business, giving us your own judgment upon the facts as you know them to be from your ten years' experience as traffic manager of this road?

A. Do you mean to take the line as a whole, or this particular division?

Q. Yes, the line as a whole; the difference in cost of transporting through business and local business. I mean, would it be a quarter more, or a half more, or twice as much; any proportion which in your judgment you think is fair, speaking from your own knowledge of the way local business and through business is handled and the necessities of the case?

A. I should say it would probably cost 125 or 130 per cent. more to handle local business than it does to handle through business on our road.

Q. 125 or 130 per cent.?

A. Yes, sir. It would be more than that, I believe.

108 Q. You mean per ton?

A. Yes, sir.

Q. An average car-load of through business would contain, you say, from 15 to 18 or 20 ton-?

A. I should say perhaps 18 tons would be a fair average for the through business.

Q. And a car-load of local business might be five ton-?

A. 5,000 pounds, on purely local business, is a good average, sir.

Q. 5,000 pounds?

A. 5,000 pounds, yes. I don't think we average that; I wish we did.

Q. You heard the testimony of the auditor, in which he stated that the average cost per ton per mile for transporting all business over the line of the Minneapolis & St. Louis Railroad Company, including both through business and local business, was 1.112 cents, did you?

A. Yes, sir.

Q. Would that cover the expense of transportation of traffic local to the State of Minnesota?

A. No, sir.

Q. What is the average number of cars in a local freight train on the Western and Pacific divisions?

A. That is pretty hard to answer. It varies at different times in the year. I have seen trains leave Minneapolis for the Western and Pacific divisions with six cars of merchandise, and I have seen them go out with twenty. I should say that the average would not ex-

ceed ten or twelve car-loads. That is merely a guess, however. I think our train records probably would show that more particularly.

Recess until 2 p. m.

IRA B. MILLS, having been sworn, testified as follows:

Examined by Mr. CLARKE:

109 Q. You are the chairman of the board of railroad and warehouse commissioners of this State?

A. Yes, sir.

Q. And were such at the time the order which includes Schedule B was made?

A. Yes, sir.

Q. In making that order, what mileage did you adopt as the distance from Duluth to Minneapolis?

A. I think the basis upon which we figured was 156.80 miles.

Q. In that case you held the rate of $1.25 of the St. Paul & Duluth from Duluth to Minneapolis to be a reasonable rate, did you not?

A. Well, we figured on that basis as a rate that they had established. I don't think we had under consideration whether that was a reasonable rate for that haul, or not.

Q. Well, you took that rate as——

A. As a basis, yes, sir.

Q. You took the $1.25 local rate in force by the St. Paul & Duluth from Duluth to Minneapolis, as a basis on which you made Schedule B?

A. Yes, sir.

Q. And that rate was $1.25 per ton, wasn't it, on hard coal?

A. $1.25 per ton, if I recollect right now.

Q. And the mileage that you figured, which we will assume to be 156 miles—I think it was figured out that it was eight-tenths of a cent per ton per mile.

A. I don't recollect now what it did figure out. If that is the figure, that is correct.

Q. In making the joint rate in Schedule B, you extended the rate from Minneapolis to local points upon the line of the Minneapolis & St. Louis and the Minneapolis, New Ulm & Southwestern, at the same rate per ton per mile at which it would figure at $1.25 from Duluth to Minneapolis, whatever the mileage was, did you not?

A. I am not sure, Mr. Clarke, whether it was figured on
110 that basis or not—whether it was extended that way. The figures will show whether it was or not.

It is agreed that the distance from Duluth to St. Paul is 152 miles, and from Duluth to Minneapolis, at the point of delivery, is 162 miles, on the St. Paul & Duluth railroad.

Mr. ARMSTRONG: Mr. Mills, figuring your mileage at 88 miles to New Ulm, and our mileage to Minneapolis at 156¼ miles, it would give you $1.95, which is the exact rate.

Mr. CLARKE: Well, that is the rate that the commission fixed.

Mr. ARMSTRONG: So that you evidently based it on 156¼ miles of

ours and 88 miles of yours, which would make exactly eight-tenths of a cent a mile.

Q. Now, at eight-tenths of a cent a mile for 88 miles to New Ulm, what would that make the proportion of the Minneapolis & St. Louis, adopting the figures that your secretary, Judge Mills, compiled in making that map or tracing that you had showing the rates and distances?

A. My impression is that we used as a basis 156 and 89.

W. M. HOPKINS, recalled, testified as follows:

Q. I will ask you first whether the coal rate from Duluth to St. Paul and Minneapolis is the same?

A. I understand it to be, yes, sir.

Q. Now, assuming the distance from Duluth to Minneapolis to be 156 miles and the mileage figured at eight mills per ton per mile, have you carried out that same rate per ton per mile to the different stations named in Schedule B?

A. Yes, sir.

Q. I will ask you now whether an extension of the rate of
111 eight mills per ton per mile from Minneapolis to the various points named in Schedule B gives the rate fixed by the commission?

A. Yes, sir.

Q. What is the rate on hard coal in car-load lots from Duluth to Fergus Falls, Minnesota?

A. $2.45 per ton. That rate is taken from the tariff of the Northern Pacific Company, on file in our office, and I assume that that is correct.

Q. That is the tariff now in force?

A. I understand it to be, yes, sir.

Q. Do you know the rate per ton per mile on that, have you figured that out?

A. Yes, sir.

Q. How much is it?

A. 1.129 cents.

Q. Now, what is the distance from Duluth to Fergus Falls by the shortest route?

A. 217 miles by the Northern Pacific railroad.

Q. What is the rate on hard coal in car-load lots from Duluth to Breckenridge?

A. $2.75 per ton.

Q. How much per ton per mile?

A. 1.136 cents per ton.

Q. What is the distance from Duluth to Breckenridge by the shortest route?

A. 242 miles by the Northern Pacific railroad.

Q. What is the rate on hard coal in car-load lots from Duluth to Appleton?

A. $2.50 per ton.

Q. What is the rate per ton per mile?

A. A cent per ton per mile.
Q. The distance is what?
A. 250 miles.
Q. And what is the rate on hard coal in car-load lots from Duluth to Cottonwood?
A. $2.50 per ton.
Q. What is the distance?
A. 248 miles; figuring a cent and eight-thousandths of a cent per ton per mile.
Q. And what is the rate to Morris, Minnesota, in car-load lots from Duluth?
A. $2.40 per ton.
112 Q. What is the distance?
A. 227 miles by the Northern Pacific railway.
Q. Is that the short line?
A. That is the short line, yes, sir.
Q. What is that per ton per mile?
A. 1.057 cents.
Q. Do you get these rates from the published tariffs?
A. Yes, sir.
Q. What was the rate from Duluth to New Ulm, Minnesota, on hard coal in car-load lots before the through tariff was canceled?
A. $2.50 per ton.
Q. How much would that be per ton per mile?
A. A cent per ton per mile, approximately. It would not figure quite that. If you used the distance the commissioners figured on, 244 miles, it would figure a trifle more than that. We figured the distance from Duluth to New Ulm in round numbers 250 miles. Using the basis the commissioners figured on it would be 244 miles.
Q. The rate then would be a little more than that?
A. Slightly, yes, sir.
Q. What is the rate to Winthrop, Minnesota?
A. $2.50 per ton.
Q. How far west did the $2.50 rate extend?
A. As far as Madison, Minnesota.
Q. And what is the distance from Duluth to Madison?
A. 331 miles.
Q. What made the rate of $2.50 a ton from Duluth to Madison, the distance being 331 miles?
A. Because the rate on the Great Northern railway at Appleton, a point opposite Madison, was $2.50 per ton.
Q. And it was made to meet that rate?
A. Yes, sir.
Q. How far west on our line did the reduction in rates on hard coal in car lots from Duluth, ordered by the commission, extend?
A. To Boyd, Minnesota.
113 Q. What was the average deduction per ton?
A. 53 cents per ton.
Q. What is the rate on hard coal in car-load lots from Duluth to Brownton, Stewart and points located on the Chicago, Milwaukee & St. Paul railroad opposite our stations of Winthrop and Gibbon?

A. $2.50 per ton.

Q. What is the rate at Bird Island and points on the Chicago, Milwaukee & St. Paul opposite Morton on our line?

A. $2.50 per ton.

Q. What is the rate at Renville and points on the Chicago, Milwaukee & St. Paul opposite Delhi or Echo?

A. $2.50 per ton.

Q. And at Montevideo, a point on the Milwaukee road opposite Clarkfield?

A. $2.50 per ton.

Q. Have the rates on hard coal from Duluth to the points which I have just mentioned to you on the Chicago, Milwaukee & St. Paul railroad, and along that division, been reduced to correspond with the reductions ordered by the commission to be made in the rates from Duluth to the opposite points on our line?

A. No, sir, so far as any published tariffs that we can find indicate.

Q. So that if the order of the commission be complied with, we would be compelled to carry hard coal from Duluth at an average rate of 53 cents per ton to points on our line from Norwood to Boyd less than is permitted by existing tariffs at opposite points on a competing railway?

A. Yes, sir.

Q. Do you know whether any complaint has ever been made to the Minneapolis & St. Louis Railroad Company as to the rates on hard coal in car-load lots from Duluth, formerly in effect from Hopkins to Madison?

A. No, sir, no complaint was ever made to us.

114 Q. Any complaint been made since the order of the commission was promulgated, as to the rates on hard coal in car-load lots now prevailing from coal shipping points—Superior, West Superior, Ashland and Manitowoc—to points on our line from Hopkins to Madison?

A. No, sir.

Q. Are the rates on hard coal in car-load lots to points on our line from Hopkins to Madison, inclusive, as low from the various coal shipping points such as Superior, West Superior, Ashland and Manitowoc, as are made at opposite points on competing railways?

A. Yes, sir.

Q. Have they been as low at all times?

A. Yes, sir.

Q. What do you understand to be the local rate on hard coal from Duluth to St. Paul and Minneapolis, by the St. Paul & Duluth?

A. I understand it to be $1.25 per ton.

Q. That would be, as you have already stated about eight mills per ton per mile?

A. Yes, sir, using the distance of 156 miles as a basis of figuring.

Q. And that is substantially the same rate per ton per mile as is made by the order of the commission and the extensions from Minneapolis to the various points named in Schedule B?

A. Yes, sir.

Q. How many tons of hard coal did the Minneapolis & St. Louis Railroad Company haul into New Ulm during the year ending June 30, 1898?

A. About 526 tons.

Q. How many car-loads would that be?

A. I haven't the tonnage per car figured out; I should say probably 25 car-loads. I should think it would average that; it might be a little more or less.

115 Q. Can you make any estimate as to the number of car-loads that are shipped from Duluth and other Lake Superior points to St. Paul and Minneapolis in a month—average?

A. Well, I haven't any definite information on that head. Probably the statement that had been asked for will furnish that information.

Q. It would be very large, would it not?

A. Yes, sir, probably a thousand cars a month, I should say.

Q. Now, Mr. Hopkins, you are an experienced trafficman. I will ask you whether it would cost less per ton to handle hard coal from Lake Superior points to St. Paul and Minneapolis, having in mind the way that it is actually handled, than it costs to handle hard coal from Duluth to New Ulm?

A. It would cost less from Duluth to Minneapolis, yes, sir. From Duluth to Minneapolis and St. Paul it would cost less than it would from Duluth to New Ulm, for instance.

Q. Yes, to any points named in Schedule B, say?

A. Yes, sir.

Q. Well, now, what would be the reason of that?

A. Because of the volume of business, enabling the companies handling the business to reduce the cost of transportation.

Q. How is business handled in the transportation of coal between Duluth and Minneapolis?

A. In car lots and probably in train lots. The volume of the business would undoubtedly justify full train-loads of coal at times.

Q. Is it customary to make a less rate on a large volume of traffic than on a less amount?

A. Yes, sir. That is one of the principles recognized in the making of classifications in tariffs. The classifications under which all freight is handled by transportation companies are divided

116 into two classes: the car lot and the less than car lot, the classification of rates on the less than car-lot business being materially higher than the classified rates on car-lot business, because it costs less to handle business in car lots than it does the same character of business in less than car lots.

Q. Would it cost less to handle hard coal in car lots to New Ulm than if it was shipped in less than car lots?

A. Yes, sir.

Q. And would it cost less per ton to handle hard coal in train loads than it would cost to handle it in car lots?

A. Yes, sir.

Q. In other words, the cost of transportation is affected by the volume of the business handled, is it?

A. Yes, sir.

Q. Very materially?

A. Very materially, yes, sir.

Q. Now, a shipment of coal from Minneapolis to New Ulm, you have explained, would not go through without any change. It would be taken out of the train where?

A. It would have to be transferred from one train to another at least three times, and, necessarily, each rehandling costs an additional amount in transportation.

Q. You understand the order of the commission assuming to establish the joint rate and assuming to make a division of the joint rate, would give the St. Paul & Duluth $1, do you?

A. Yes, sir, as their proportion of the through rate.

Q. What is the customary method employed by railroad companies in dividing earnings derived from the transportation of freight covered by a through or joint tariff?

A. There is no fixed rule of dividing revenue between railway companies interested in traffic covered by a joint or through
117 tariff. It is a matter between the companies interested, as to what one is willing to give and the other is willing to accept.

Q. Where there are competing lines reaching certain points between certain points and the connecting carrier which receives the traffic at the terminal of the competing lines, it is then simply a question of which one they can make the best bargain with, is it?

A. That is the rule, yes, sir.

Q. For instance, to illustrate what I mean; if there was an established rate of $1.95 from Duluth to New Ulm or $2.50 from Duluth to New Ulm, and several roads bringing the coal from Duluth to Minneapolis, and we had a line extending as we have from Minneapolis to New Ulm, do I understand then that we would make the arrangements for transportation with the carrier who would give us the best divisions?

A. We would make the arrangement that seemed to our best interest to make for carriage, yes, sir.

Q. Well, to put it into practical operation, now, Mr. Hopkins; suppose a joint rate is made between two railroad companies having facilities for connections, and the rate thus made is less than the sum of the two locals, practically does one of the connecting carriers stand the whole loss or is it divided between them, each one making some reduction from its local rate in order to agree upon a joint rate?

A. Why, as a general principle, without any modifying circumstances, it might be stated that it has been customary between lines in interest, to each bear a portion of the shrinkage; but it would depend largely on circumstances. Now, in this particular instance, having a tariff on hard coal from Manitowoc and Ashland, and from Duluth and from Superior and West Superior to New Ulm,
118 the line from Duluth would have to allow us as great a proportion of the earnings for our haul from Minneapolis as we would be able to derive on a shipment coming from Manitowoc, for

instance, or Milwaukee, or Chicago, as the case might be. It is a question of barter.

Q. Well, is there any such custom or rule for making a mileage pro rate between connecting carriers?

A. That is sometimes done, yes, sir; but not where one line is a portion of a through line competing for traffic in competition with other lines handling traffic in other directions and where the traffic is wholly local to the line receiving the traffic.

Q. It is not a customary thing to do, is it?

A. No, sir.

Q. For instance, the lines east of the Mississippi won't make any mileage pro rate with lines west of the Mississippi, will they?

A. No, sir; nor lines west of the Missouri, either.

Q. It is not a customary thing in practice?

A. No. Under certain circumstances it would be.

Q. Well, they would be exceptional circumstances, would they not?

A. Yes, sir. Where the traffic originates or terminates on your own line locally, every carrier concedes that that traffic belongs to the company on whose line it originates or terminates, and that line gets a larger percentage of the rate than their mileage would entitle them to.

Q. Really it is simply a question of barter between connecting railways as to what one is willing to give and the other is willing to accept as revenue derived from traffic covered by the joint or through tariff, isn't it?

A. Yes, sir.

Q. Now, in reference to the division of revenue derived from
119 shipments of hard coal to New Ulm from points taking the $2.50 rate per ton, what is the least amount that the Minneapolis & St. Louis Railroad Company accepts as their proportion for the service rendered by it?

A. $1.50 per ton.

Q. What is the rate on hard coal from Manitowoc or Ashland, in car-loads, to New Ulm?

A. $2.50 per ton.

Q. And what proportion of that rate would accrue to the St. Louis Company?

A. $1.50 per ton.

Q. I understand then, that the Minneapolis & St. Louis Company has arbitrarily fixed its proportion of the through rate of $2.50 per ton on hard coal to New Ulm at $1.50 per ton, regardless of the point of origin?

A. Yes, sir.

Q. Is that as low a division as you have ever accepted on anthracite coal to New Ulm?

A. Yes, sir.

Q. I will ask you whether you think that the Minneapolis & St. Louis Railroad Company can afford to accept any less rate than the $1.50 per ton for the service rendered in the transportation of hard coal from Minneapolis to New Ulm, bearing in mind the way the

road is operated and the cost of operation, and all existing conditions?

A. I don't think we could afford to accept any less.

Q. In a case where there was a joint rate fixed by agreement between two railroad companies and a reduction was made in the through rate, how would the shrinkage be divided in actual railroad practice?

A. It is a matter of agreement.

Q. Well, would any reference be had to the existing divisions? I refer to a case where there is already an existing through rate by agreement and a reduction is made in the through rate.

A. Well, if a reduction is made by agreement, a fair basis
120 of dividing the reduced rate would be in proportion to the former divisions existing; each should bear such proportion of the shrinkage as their division bore to the former rate.

Q. Under the old rate, then, we had $1.50 per ton and the St. Paul & Duluth had $1 per ton?

A. Yes, sir.

Q. And we got three-fifths of the through rate?

A. Yes, sir.

Q. Now, then, if we were to take the commission's rate of $1.95 from Duluth to New Ulm and bore the shrinkage proportionately—that is what you mean would be an application of that rule?

A. Yes, sir.

Q. That would leave us how much?

A. We would get three-fifths of the new rate.

Q. Instead of getting 95 cents, then, we would get $1.17?

A. Yes, sir, practically.

Q. That is what you mean, isn't it?

A. That would be a customary manner of dividing the shrinkage of the through rate. It would not necessarily follow that that would be the method in this case, because some carrier from West Superior or Ashland or Manitowoc might be willing to accept less; in which event the carrier from Duluth, if he wanted to compete for the traffic, would have to accept the same amount of earnings as its competitor did. As I stated before, there is no fixed rule between carriers for dividing revenue on traffic covered by through tariffs. It is simply a question of barter.

Q. Do you know of any practical instance of that on shipments of hard coal from Duluth?

A. Yes, sir. We have it on our own line existing now.

Q. What are they?

A. The St. Paul & Duluth Company, on coal, to points on our main line, southern division.

121 Q. Can you give me an instance, any station?

A. Well, the rate to points Albert Lea and south.

Q. Well, how is it to Waseca, north of Albert Lea?

A. Well, Waseca—the St. Paul & Duluth accepts less revenue than they accept for the same service on coal transportated to our Pacific and western divisions.

Q. What is the distance from Duluth to Waseca?

A. 232 miles.

Q. What is the rate on anthracite coal in car-loads from Duluth to Waseca?

A. $2.25 per ton.

Q. That is over the St. Paul & Duluth and the Minneapolis & St. Louis?

A. Yes, sir.

Q. Now, what proportion of that rate accrues to the St. Paul & Duluth, and what proportion to the Minneapolis & St. Louis?

A. The St. Paul & Duluth Company receives 90 cents per ton, and the Minneapolis & St. Louis Company $1.35 per ton.

Q. And the St. Paul & Duluth renders the same service that it does in handling coal that would go to New Ulm?

A. Yes, sir.

Q. Now, what percentage of the revenue for the transportation of hard coal from Duluth to Waseca at the rate of $2.25 per ton, does the St. Louis receive, and what percentage does the St. Paul & Duluth receive?

A. The St. Louis Company would receive 60 per cent. and the St. Paul & Duluth Company 40 per cent.

Q. Now, the former rate in effect on hard coal from Duluth to New Ulm before the commission's order was made, was $2.50, wasn't it?

A. Yes, sir.

Q. And what proportion in percentages of that rate did the St. Louis Company receive?

A. It received $1.50 per ton, or 60 per cent.

122 Q. The same percentage that they receive on the reduced or less rate to Waseca?

A. Yes, sir.

Q. What proportion of the proposed commission's rate was allowed the Minneapolis & St. Louis Company by the commission for the transportation of hard coal in car lots from Duluth to New Ulm?

A. 95 cents per ton, or 44 per cent. of the through rate of $1.95.

Q. So that while on the transportation of coal from Duluth to Waseca the Duluth Company voluntarily allows us 60 per cent. and gave us 60 per cent. under the old tariff to New Ulm, under the commission's rate we give them 56 per cent. and we take 44 per cent.?

A. We would if we accepted it.

Q. Yes, if the commission's rate were put into effect.

A. Yes, sir.

Q. Now, you spoke of the rate on shipments of anthracite coal from Duluth to points south of Albert Lea on the main line. What proportion of the through rate did the St. Paul & Duluth Company accept?

A. 85 cents per ton.

Q. And the Duluth Company voluntarily accepts 85 cents per ton for exactly the same service for which the commission allows them $1 a ton by their order; is that correct?

A. Yes, sir.

Q. For hauling the same product over the same rails and making delivery of the goods at the same point?

A. Yes, sir.

Q. Are those rates higher or lower than the Waseca rate?

A. Higher.

Q. How much of a factor in the division of the revenue is the distance that each line hauls traffic?

A. Not very much in the division of revenue on business covered by joint tariffs.

123 Q. Isn't it a fact that each company is conceded a greater proportion of revenue on business destined to its local stations than it would be entitled to under a mileage pro rate of the distance which each company carries the commodity?

A. Yes, sir.

Q. That is railroad custom and railroad practice and operation, is it not?

A. Yes, sir.

Q. That the company upon whose line the point of destination is situated gets a larger share of the tariff rate than it would get under a simple mileage pro rate?

A. Yes, sir.

Q. It furnishes the market for the commodity?

A. Yes, sir.

Q. What proportion of the revenue do we receive on shipments covered by joint through rates from Chicago to New Ulm?

A. On hard coal?

Q. Yes.

A. 63 per cent. The rate is the same from Chicago to New Ulm as from Duluth to New Ulm.

Q. And we get 63 per cent.?

A. That is, it is the same as the rate was from Duluth to New Ulm.

Q. Yes, the old rate.

A. Yes. $2.50 per ton.

Q. Now, if that were divided on a mileage pro rate, what percentage would we get?

A. About 38 per cent.

Q. Now, under the custom you have spoken of, giving the company upon whose line the point of destination is situated a larger share of the revenue than it would obtain if the revenue were prorated on a mileage basis—is that the case with other points on our line as well as New Ulm?

A. Yes, sir.

Q. There was no objection on the part of the Duluth lines to paying the divisions which you have testified to, was there?

A. Not so far as I am aware.

124 Cross-examination.

By Mr. O'BRIEN:

Q. Mr. Hopkins, as I understand it the number of tons of coal which during the year ending June 30 1899 were hauled over your

road to the points mentioned in Exhibit B was something over 2,400 of hard coal?

A. It was about that. It was 1898, instead of 1899, though.

Q. Well, was it about the same in 1899?

A. I don't know; I haven't figured 1899 yet. I should think it would average about that year in and year out.

Q. There is some increase each year, is there not?

A. Not very materially. There might be a small increase, but not very materially.

Q. Now, have you estimated the number of tons of hard coal destined for those points, carried one mile?

A. No, sir.

Q. You have given the shipments made to the different stations, and that could be compiled, could it not?

A. Yes, sir; we can find that if you care for it.

Q. Now, when you have spoken of the average reduction made by the commission, you have simply spoken of the average deduction that was made, without reference to the amount of coal that was actually carried?

A. Yes, the average reduction per ton, taking the rate to each station and taking the number of stations.

Q. Taking the rate to each station, and the average rate for the entire number of stations, and then the rate as fixed by the commission?

A. Yes, sir. Understand, the reduction would be greater at some stations and less at others, so that the average for all those stations would be 53 cents, I think.

125 Q. But that average has been made without reference to the actual amount of coal carried at each station?

A. Yes, sir.

Q. So that that average which you have given—average reduction of 53 cents a ton, I think—you could not from that arrive at the actual loss of revenue from this reduction?

A. No, if you used that as an average it wouldn't be fair, because the loss in revenue would be greater, because the reduction is greater to stations using the greater amount of coal. For instance, to New Ulm the reduction would be 65 cents a ton, and New Ulm uses more coal than any other one station.

Q. I simply wanted to find out if that could be taken as a fair basis to arrive at the actual loss of revenue. It couldn't?

A. No, it would be unfair to us to take that basis.

Mr. CLARKE: You mean by "us," the Minneapolis & St. Louis Railroad Company?

A. Yes, sir. It would not be a fair basis to figure on.

Q. Now, I believe you have testified that the average rate per ton per mile for freight upon the Minneapolis & St. Louis road, prior to the order of the commission, was 1.112 cents—was it not?

A. I don't know; I don't think I testified in respect to that at all. I think Mr. Nay——

Mr. CLARKE: Mr. Nay testified to that.

Q. Well, that is the fact, is it not?

A. Well, whatever the figures are, I don't recollect them. Whatever he testified to, I presume is correct.

Q. Now, will you please name some commodities for which the tariff is lower than that?

A. I couldn't do that without the records of the traffic movement.

126 Q. Can you give us the lowest rate per ton per mile that was charged by the Minneapolis & St. Louis railroad upon any article?

A. I could not without reference to the records, no, sir.

Q. Have you got those records with you?

A. No. That wouldn't come within my jurisdiction; that would be in the accountant's office. You would have to take the lowest-priced commodity, whether it was coal or sand or brick, whatever it was, and then figure the amount earned per ton per mile.

Q. Well, can you give any of the higher-priced commodities?

A. I can give you a list of commodities taking a higher rate than coal, but I cannot give you the average cost per ton per mile on any of them.

Q. Well, give us some that would be classified higher.

A. Oh, merchandise, dry goods, fruits, grain, lumber.

Q. What elements are taken into consideration in fixing the tariff upon any article? Just in a general way.

A. Well, in making a tariff today, you would put in rates on any commodity on any particular portion of the line to line up the rates in competition with those at opposite points on other railways.

Q. Well, of course that is a general principle.

A. That is the practical way of putting it.

Q. But in classifying articles?

A. Well, all articles are classified under the classification, you know, and their class fixed by the classification.

Q. Well, the expense of handling an article is one of the considerations that is taken into account, is it not?

A. Yes, in making a classification, the cost, the form and size of the package, is taken into consideration as an element in the cost of handling it; the value of the package is taken into consideration, and also whether it is released or not released, and the cost

127 of handling it by the railroad companies, and as to whether it can be shipped in car lots or in less than car lots.

Q. As to whether or not it is a perishable article?

A. Yes, sir, that would be an element entering into it.

Q. As to whether or not it is an article which requires particular watchfulness upon the part of the company to preserve it—that would be a consideration, would it not?

A. Yes, sir, that would be an item in the cost of transportation.

Q. As to whether it was an article which could remain in cars upon a side track for a greater or less length of time would be taken into consideration, would it not?

A. Whether it was perishable or not, yes, sir.

Q. Well, "perishable" might mean what you would describe as

the perishable character of fruit, because it would decay in a short time?

A. Yes, sir.

Q. Also as to whether or not it would be destroyed in case of a wreck—liable to be destroyed in the case of a wreck—that would be another consideration, would it not?

A, Yes, sir.

Q. An article might be classed as perishable without being at all perishable from mere lapse of time?

A. Yes, sir.

Q. Or it might be perishable merely by the delay of a few days; isn't that the case?

A. Well, it might be, yes. You might not be able to ship corn in July, but you could ship it in October.

Q. In other words, the difficulty of handling the article, cost of handling it, and the responsibility assumed by the railway company.

A. The size and form of the package.

128 Q. The size and form of the package are all taken into consideration?

A. Yes, sir.

Q. Now, it is true, as you say, I believe, that the profit per ton per mile on through freight is greater than that on local freight?

A. That is just the reverse of the proposition. The cost of handling it is less.

Q. Well, now, what do you designate as through freight?

A. Any traffic that is taken in through trains; that is, trains that do not do local work.

Q. That does not necessarily mean interstate commerce, does it?

A. Oh, no; not at all.

Q. Freight that is carried from one terminal point to another would be through freight, would it not?

A. Not necessarily. For instance, if we had a train-load of freight going from Minneapolis to Chicago, we would carry it through to Albert Lea and connect with another carrier; we would call that through freight. But if that train consisted of what is known as peddlers, stopping and distributing, discharging as it went along, that would be a local train.

Q. Now, why is it that the cost of handling through freight is less than the cost of handling local freight?

A. The cost of labor is more, because more labor is required in handling local freight. The cost of fuel is greater, because more is used in shifting your cars, stopping your train, discharging and receiving freight. The cost of handling by your agents and employés through your warehouses is greater, and wear and tear on your cars and machinery make it more expensive than on through consignments which do not require that handling.

Q. Through consignments are generally in car-load lots, also, are they not?

A. Not necessarily, no, sir.

129 Q. Not necessarily, no, but generally?

A. No, sir, I wouldn't say generally. We receive a great

deal of merchandise in less than car lots that is through business. It is loaded up so far as possible in through cars which are not filled up, but it consists of various articles consigned to various consignees.

Q. Now, as to the method in which coal in car-load lots was handled jointley by your company and the Duluth Company prior to the making of the rate by this commission, is the thing I wish you would describe.

A. We received the cars from the St. Paul & Duluth Company——

Q. At what point?

A. At St. Paul or Minneapolis. They were taken into our——

Q. Before we get any further, you say "at St. Paul or Minneapolis"?

A. Yes, sir.

Q. Was it the custom to receive them at both of these points?

A. Yes, sir.

Q. Now, at whose convenience was that determined?

A. I should say perhaps both companies.

Q. Both companies?

A. Yes, sir. The major portion of the business probably was interchanged at Minneapolis.

Q. The great bulk of the cars were changed at Minneapolis?

A. I think that is true of coal. That is a matter that would be in the hands of the operating people and not in the freight department.

Q. Now, at what point in Minneapolis?

A. Where we have intersection of tracks; either on the east or west side of the river; I can't answer that, because I really do not know.

Q. Has the St. Paul & Duluth Company yards at Minneapolis?

A. I think they have, on the east side of the river, yes, sir.

1130 Q. Do their yards connect directly with your yards?

A. Yes, sir. That is there is a joint transfer track.

Q. The yards do not overlap each other?

A. Oh, no.

Q. Then the custom was that the coal destined for your road, in the great majority of cases, was hauled into your yards by the St. Paul & Duluth?

A. It would be set on the transfer track, yes, sir.

Q. And it was then taken by your road, without change of cars?

A. Yes, sir.

Q. And when your trains were made up, hauled along on your roads?

A. Yes, sir.

Q. When delivered by your company, where was the coal delivered at the various stations?

A. At those local stations?

Q. Yes.

A. Well, that would depend. If it was for a consignee having a coal shed, on the track, it was delivered at the coal shed; the car was set at the coal shed. If the consignee did not have a coal shed, then it was set on the delivery track.

Q. In any instance did the rate established by you include the

handling of the coal? That is, the taking of the coal from the car by your company.

A. Taking it from the cars?

Q. Yes.

A. I don't know that I understand what you mean.

Mr. CLARKE: Unloading it, do you mean?

Mr. O'BRIEN: Yes.

The WITNESS: No, sir.

Q. Nor does the rate established by the commission contemplate the unloading of the coal from the cars?

A. I don't know, sir. I don't suppose it does.

Q. So far as the handling of the coal is concerned, the hand-
131 ling by your company consisted and would consist entirely of simply taking the cars from the connecting track which you have spoken of (transfer track), attaching them to your train, and delivering that same car on the side track at the point of delivery?

A. Yes, sir.

Q. Now, hard coal in car-load lots would ordinarily come under one of the cheaper classifications, would it not?

A. Yes, sir.

Q. What article of commerce would naturally be classified at a lower rate?

A. A number of articles are classified at lower rates, but there are a good many articles that might be classified very much higher which might be hauled cheaper.

Q. I know, but I am asking you as a practical gentleman, what articles of commerce would naturally be classified at a lower rate.

A. Why, brick, stone, clay, all might be classified lower. A great many commodities are taken out of the classification and put into what is known as the commodity tariff and might probably be carried lower under the commodity tariff, or possibly carried lower than the coal rate necessarily would be. For instance, wood tariff; we might make a less rate on wood than on coal; commercial conditions might necessitate it. That would be taken out of the classification and put into the commodity tariff.

Q. Well, was there a less rate made on wood than there was on coal?

A. I can't tell that without referring to another schedule.

Q. How would it be about soft coal?

A. Soft coal would take probably a less rate than anthracite coal.

Q. Why would it be less?

A. The value is less.

132 Q. As a matter of fact, you could get a greater quantity of hard coal, could you not, on a car, than soft coal—a greater weight?

A. No.

Q. The weight would be about the same?

A. Load up the car to its capacity; the intention is to load up to its capacity.

Q. In either case, with either hard or soft?

A. Yes. The difficulty in handling commercial coal either hard or soft, is in a fellow's orders; he might order a car of 12 or 14 tons and you would have to transport that in a car in place of carrying thirty tons, so that it makes the car-load smaller than it ought to be—both hard and soft coal.

Q. Now, can you tell any other commodities?

A. Varying conditions from year to year might necessitate commodity rates on most any product, less than your coal rates. Take hay; commercial necessity might seem to demand a very low rate on hay, for fear it would spoil—in which instance the carriers or owners wouldn't get anything out of it, and we might bring it into the market very cheap.

Q. Well, of course, Mr. Hopkins, that isn't an answer to my question. I suppose that in railroad business, as in everything else, condition- may arise that might change tariffs or might change circumstances; but I am asking you as to natural——

A. Well, I want to be fair in the matter.

Q. What commodities besides those which you have mentioned can you name that would naturally be classed at a lower rate than coal? You said brick, stone, clay. Soft coal?

A. Yes.

Q. And possibly hay?

A. Yes, and salt. All articles classified under class E. Coal would be classified under class D in the classification. As a
133 rule, coal is handled under what is known as the commodity tariff, but the classification of hard coal is class D.

Q. Is D the lowest class?

A. No, sir, E.

Q. E is the lowest class?

A. Yes, sir. Now, those articles I have mentioned would come under class E, and it is a fact that conditions arise very often where high-priced commodities are taken on very nominal rates because commercial necessities seem to require it.

Q. Coal would be classed under class D?

A. Coal would be classed under class D, yes, sir.

Q. And all of the commodities which are classed under A, B and C, would be higher?

A. Yes, sir.

Q. A higher classification?

A. Yes, sir.

Q. Require a higher rate. Now, the manner in which the coal would be handled, in any given instance, would also affect the reasonableness of the rate to be charged for it, wouldn't it?

A. I don't know but it would. I don't know that I understand what you mean.

Q. Well, for instance, you say coal is properly classed in class D?

A. Yes, sir.

Q. That is one of the low classifications?

A. Yes, sir.

Q. Now, if that coal was to be carried in single ton lots and had

to be handled more or less by the company hauling it, the company carrying it would be entitled to charge a higher rate for it than if it was carried in car-load lots without any handling by the company?

A. That would change the classification, if we handle in less than car-load lots. Class D is coal in car-load lots. If you ship coal in less than car lots that changes the classification of it; that would be a higher classification.

134 Q. The conveniences furnished by a railroad company or by a carrier for the handling of any particular class of freight would also affect the reasonableness of the tariff, would it not?

A. I don't know that it would.

Q. Would it not be more reasonable to charge a high rate for a commodity which you received in your warehouse and afterwards loaded upon your cars and again unloaded into a warehouse, than for a commodity which required none of that work?

A. Yes, but that would not be conveniences furnished by the company.

Q. Those would not be conveniences furnished by the company?

A. I shouldn't consider them so.

Q. You consider freight-houses as conveniences furnished by the company, don't you?

A. I should say they are necessities for handling the business.

Q. Now, then, the handling of this coal requires absolutely nothing of that sort, does it? You have no coal sheds?

A. No, sir, except for our own company coal.

Q. You receive this coal in car-load lots from the other carriers and simply deliver it on the side-track at the point of destination?

A. Perform the ordinary transportation service, yes, sir. I don't know that I get your point clearly. But take a threshing machine, for instance, to a local station; we would not charge any higher rate for that whether we had a platform to load that on or whether the consignee had to unload it from the car; that would be a convenience, but we would not exact a higher rate whether there was a platform or not. If we erected a platform, that certainly would be a

135 convenience for the owner of that property, it might not be for the railroad company, but it would not add to the rate any.

Q. Well, what I am trying to get at is this; take, for instance, threshing machines, dry goods, a great many kinds of commodities; they do require the erection of a platform or freight-houses, and you have them erected?

A. We have to furnish reasonable——

Q. So that if at any time it becomes a necessity, you can use them?

A. We have to furnish reasonable facilities for the care of freight.

Q. But so far as hard coal is concerned, you do not require them and have not erected any such conveniences?

A. I think I understand what you mean. The nature of the property does not require anything beyond a vehicle for its transportation.

Q. And that is one of the reasons that it is put in the low classification, is it not, amongst others?

A. Why, not more so than wheat and lumber and all other carlot commodities.

Q. Of course there are other commodities that come in the same classification or that are subject to the same rules, but I say that is one of the considerations that is taken in account in classifying those articles?

A. Its value and indestructibility, and one thing and another of that kind, would have to be considered, yes, sir. Coal ordinarily is construed as a low priced transportation commodity.

Q. What is the distance from Duluth to Fergus Falls by the Northern Pacific road?

A. 217 miles.

Q. And the rate is how much?

A. $2.45 per ton, according to their schedule.

Q. And that is how much per ton per mile?

A. As I figure it, it is 1.129 cents.

136 Q. Now, what is the distance from Duluth to Fergus Falls by the Great Northern?

A. I don't know, sir; I think it is somewhat longer, but don't know how much.

Q. What is the rate on that road?

A. I don't know that. I assume it must be the same as on the Northern Pacific, however, or they wouldn't get any business.

Mr. CLARKE: The short line always makes the rate.

Q. The short line makes the rate?

A. As a rule, yes, sir.

Q. Now, you can't tell us what the rate per ton per mile is on the Great Northern from Duluth to Fergus Falls?

A. No, sir, I haven't the distance here.

Q. Can you tell us what the distance is from Duluth to Breckenridge by the Great Northern?

A. No, sir.

Q. Nor the rate to that point on that road?

A. No, sir, but I can give you the short-line distance there.

Q. No, but I mean the long-line rate and distance. The Great Northern hauls coal to all those points, does it not?

A. I presume so.

Q. Is it competing for that business?

A. I should think so.

Q. The Great Northern hasn't found it necessary to go out of the business of hauling coal there because of the rate fixed by the short line?

A. I don't know. I suppose not. I know we haul lots of business that we don't make much on because the short line fixes the rate.

Q. Now, what is the distance from Duluth to Madison?

A. 331 miles.

Q. And what is the rate?

A. $2.50 per ton.

Q. That was the joint rate over the St. Paul & Duluth and the Minneapolis & St. Louis?

A. Yes, sir.

137 Q. And what is that per ton per mile?

A. About .76 of a cent per ton per mile.

Q. Now, how was that rate fixed at that amount?

A. What makes the rate $2.50 on that?

Q. Yes.

A. To enable the communities on our line to get their coal as cheaply as the communities at opposite points on competing lines.

Q. Is there a shorter line from Duluth to that point than over the St. Paul & Duluth and Minneapolis & St. Louis?

A. To Madison?

Q. Yes.

—. No, sir.

Q. Well, what competition is there there?

A. Why, the competition is from a competing point opposite, on another line.

Q. Well, what line is that on?

A. On the Great Northern and the C., M. & St. P.

Q. On the Great Northern and the Chicago-Milwaukee?

A. Yes, sir.

Q. What is the distance from Duluth to Madison on the Great Northern?

A. I think it is 250 miles to Appleton. It doesn't reach Madison.

Q. What is the nearest point reached by the Great Northern?

A. I think probably Appleton would be.

Q. And what is the distance from Duluth to Appleton on the Great Northern?

A. 250 miles.

Q. As against 331 on the Minneapolis & St. Louis and St. Paul & Duluth?

A. Yes, sir.

Q. So that, in that case, also, the short line fixes the rate?

A. Yes, that is the invariable custom.

Q. And prior to the making of this order, the St. Paul & Duluth and Minneapolis & St. Louis met that rate?

A. Well, you understand the order didn't affect Madison.

138 Q. Well, I say you met that rate that was fixed by the short line?

A. Yes, and we meet it yet.

Q. Are you still competing for that business?

A. Yes, sir.

Q. And are giving to the St. Paul & Duluth $1 of that $2.50?

Mr. CLARKE: If that question refers to rates not involved in this controversy, I advise you not to answer it, I instruct you not to answer it.

The WITNESS: Madison is not one of the points to which the commission has fixed the rates.

Q. The joint rate from Duluth to Madison, you said, Mr. Hopkins, was $2.50?

A. Yes, sir.

Q. Have you at the present time a joint-tariff agreement with the St. Paul & Duluth concerning that rate?

Mr. CLARKE: You need not answer that question.

Q. Do you decline to answer that question?

A. Yes, sir, I do, by advice of counsel.

Q. If the Minneapolis & St. Louis Railroad Company and the St. Paul & Duluth have such a joint-tariff agreement, I ask you to state what it is.

Mr. CLARKE: Answer that you decline to answer the question, by advice of counsel.

The WITNESS: I will make that answer.

Q. You decline?

A. Yes.

Q. Why do you decline to answer that question, when on your direct examination you gave the rate to Madison and also gave the rates and the division to Waseca and Albert Lea?

Mr. CLARKE: Counsel advises the witness that he may answer as to what the rate is to Madison, but whether or not there is a joint rate and as to divisions he need not answer. We admit we have a rate to Madison of $2.50; whether it is a joint rate or what
139 the divisions are, the witness is instructed he need not answer.

WITNESS: I will answer that we haven't any at the present time from Duluth to Madison. If I have made any answer contradictory to that, I would like to have it stricken out. From Duluth to Madison, Minnesota, we haven't any rate on hard coal.

Q. I understand that prior to the withdrawal of the tariff which you mentioned with the St. Paul & Duluth road, you did have a joint rate to Madison?

A. Yes, sir, we did have.

Q. And that rate was $2.50 per ton?

A. Yes, sir.

Q. Now I ask you what proportion of that rate was received by the St. Paul & Duluth under your tariff agreement?

Mr. CLARKE: On all our rates we got $1 a ton.

A. $1 per ton.

Q. You have not stated that that was the universal division between the Minneapolis & St. Louis and the St. Paul & Duluth, have you? For instance, at Waseca there was a different division?

A. Well, that is a different story. I have no objection, if Mr. Clarke does not object, to telling you the division from Duluth to Watertown. (To Mr. Clarke:) Is there any objection to stating that that was the division allowed the Minneapolis & St. Louis on all that line?

Mr. CLARKE: Of course it was.
Mr. O'BRIEN: Prior to the calculation of the tariff?
Mr. CLARKE: Yes. $1 per ton.

Q. Now, what was the reason that a different division was made on the other line, for instance at Waseca and Albert Lea?
A. Competition.
Q. What was the competition there?
A. The rates were reduced to that territory because they
140 wanted to participate in the traffic from Duluth. They were reduced from Chicago, I should say.
Q. What are the roads that compete at those points?
A. Well, the Chicago & Northwestern road.
Q. Consequently the Duluth road met the competition by reducing the amount of the joint rate which they received?
—. Yes, sir.
Q. So that all of these questions with regard to how you divide your rates with each other and what reduction is made and how the revenue is divided when a reduction is made, depends upon competition, does it not?
A. Well, it depends upon the agreement that the parties made.
Q. Yes, but the agreement is made in view of the existing condition?
A. Well, of course. Tariffs are made in view of existing conditions.
Q. Well now, there is competition from the Lake Superior point to the twin cities, is there not, on hard coal?
A. There are different carriers, yes, sir.
Q. The twin cities are distributing points, are they not?
A. Certainly.
Q. And there is competition from the lake points to the twin cities between different roads?
A. Between different carriers, yes, sir.
Q. The amount of the joint tariff which the road receives that carries the coal from one of the Lake Superior points to the twin cities is fixed by that competition, is it not, largely?
A. I cannot say. I suppose it is fixed by agreement between themselves.
Q. Yes, of course it is fixed by an agreement, but the agreement is arrived at in view of the competition, is it not?
A. I can't say as to that; I don't make those tariffs.
141 Q. You don't know that?
A. No, sir; I don't know anything about that.
Q. Well, don't you know—you make these agreements?
A. Not between Duluth and St. Paul and Minneapolis.
Q. Don't you take part in the negotiations?
A. Not between St. Paul and Minneapolis and Duluth.
Q. Well, I wasn't talking about between St. Paul, Minneapolis and Duluth. I say joint-tariff agreements that are made between the roads taking the coal from St. Paul and Minneapolis, with the roads which bring it to St. Paul and Minneapolis?

A. If it goes to our line, certainly we would be parties to it.

Q. And you personally conduct the negotiations, don't you?

A. As a rule, yes, sir.

Q. Now, you are able to arrive at the terms which you make, because of the competition from Lake Superior points to St. Paul and Minneapolis, are you not?

A. No, not always.

Q. That is one of the elements?

A. That would be an element—competition between lines.

Q. Yes.

A. And competition between lines from Wisconsin and from Chicago.

Q. Is it an invariable rule that the carrier upon whose line the freight originates, receives a less proportion of the joint tariff than the carrier who delivers the freight to the consignee?

A. No.

Q. Let us suppose that the conditions were reversed and that there was only one line reaching St. Paul and Minneapolis from Lake Superior points, but a great many competing lines starting from St. Paul and Minneapolis and running to the distributing points; the conditions would be just reversed, would they not?

A. No, sir.

142 Q. Would it not be, then, that the roads which gave to the single line the greatest proportion would be likely to receive the bulk of the freight?

A. Not if it is destined to local points on those lines, it wouldn't.

Q. You don't answer my question; maybe you don't understand it. I said if the competition was to the point of consignment and the single line was from the point where the freight was received to the Lake Superior distributing point. The conditions would be just reversed, would they not?

A. No, sir.

Q. They wouldn't be?

A. No, sir; the chances are that the division would be less to the Duluth line.

Q. Then you think that the line upon which all of the freight must originate and which must haul the freight, would not deliver it to the competing line which would give it the largest proportion?

A. Well, that is a different case. It doesn't necessarily have to originate on that line, it may come from some other point, and the line terminating at Lake Superior must make a bargain with its connecting line that is satisfactory, otherwise it can't get its commodity in there at all.

Q. Well, you imagine always a different case from the one I put to you. I understood you on your direct examination to say that it was an invariable rule that the carrier upon whose line the freight originated——

A. Or terminated.

Q. No, originated, received a less proportion of the joint tariff than did the carrier upon whose line the consignee resided.

A. No, that is not true. If I made that statement, I didn't intend to make it.

Q. That would depend upon where the competition was?

A. Yes, sir.

Q. Yes, of course, it must.

143 A. What I mean to say is this: That if traffic is destined to your local territory or is going from your local territory—that is, originating or terminating on your line, you would get a larger proportion under the practice of making joint rates and divisions of joint rates than you would get if that business was in competition with other lines, on the theory that that is your local business and if the other fellow wants to participate in it he has got to pay something for the carrying of it.

Q. Now, what is the short line from Duluth to St. Paul and Minneapolis?

A. I think it is the St. Paul & Duluth road.

Q. And is that also the shortest line from any Lake Superior point to St. Paul and Minneapolis?

A. I don't know, but I think it is.

Q. None of the other points on Lake Superior which have been mentioned are within the State of Minnesota, are they?

A. No, sir. Superior, West Superior, Ashland and Bayfield are in Wisconsin.

Q. All those points are outside the limits of the State of Minnesota?

A. Yes, sir.

Q. What is the distance by the shortest route from Chicago to Waseca?

A. I don't know.

Q. Can you approximate the distance?

A. Probably 450 miles. If I had a guide I could tell you.

Q. About 450 miles?

A. I should say something in that neighborhood.

Q. After the commission had made its order fixing the rate to the points named in Schedule B, you withdrew from all tariff agreements with the St. Paul & Duluth road—your road did?

A. We canceled the joint tariff with the St. Paul & Duluth road on that particular commodity.

144 Q. Since that time have you refused to haul coal consigned to these points, originating on the St. Paul & Duluth road?

A. No, sir.

Q. What is the present attitude of the Minneapolis & St. Louis road with reference to coal consigned to those points and brought from Duluth on the St. Paul & Duluth road?

A. As a common carrier we handle any business that is tendered to us, any business that is properly handled by a common carrier.

Q. So that you are prepared to accept any coal offered you by the St. Paul & Duluth road at this time?

A. Yes, sir.

Q. From any of these points?

A. To any point on our line; yes, sir.

Q. Now, the Minneapolis & St. Louis railroad has refused to accept the tariff fixed by the commission?

A. Yes, sir.

Q. Or to recognize the right of the commission to fix that joint tariff; that is the case, is it, Mr. Hopkins?

A. Yes, sir; and the division too.

Q. Mr. Hopkins, will you explain the matter of the refusal by the Minneapolis & St. Louis Company to receive a car-load of coal from the St. Paul & Duluth Company?

A. We never refused to accept any car-load of coal from the St. Paul & Duluth Company, except that we did refuse to receive a car-load of coal tendered to us under a joint tariff which we did not have with the St. Paul & Duluth Company.

Mr. CLARKE: Now, you may state, if it was a fact, any offer that was made or anything that was said as to our willingness to transport it under our regular tariff.

The WITNESS: We were perfectly willing to take it under the tariff which existed, which was our local tariff, the only tariff which we had.

145 Mr. MILLS: That was under class D, wasn't it?

The WITNESS: Yes, sir.

Examined by Mr. ARMSTRONG:

Q. Mr. Hopkins, referring to those Albert Lea rates, the rates from Albert Lea south over your line, the rates in that territory are largely fixed by competition of Chicago and Lake Michigan points, are they not?

A. Yes, sir; we also have rates from Chicago and Milwaukee to our Western and Pacific divisions, and Southwestern division.

Q. So that under the system of making joint rates by bargaining between the companies, the St. Paul & Duluth Company practically has to accept what is offered them to those points or go out of business?

A. Well, I wouldn't state it in exactly that way.

Q. Well, perhaps that is unfair, but they have to accept a proportion which would be equal to the Chicago proportion; that is, they have to accept a rate which would make your earnings on the same basis as your earnings would be under an arrangement with the Chicago lines?

A. That is it. That is, we earn a certain amount on coal coming from Chicago, whether it goes to our Second division, our Pacific division, our Western division or our Southwestern division. Now, then, in making a tariff from Duluth, with the St. Paul & Duluth or any other company, the question is, what can we afford to accept on that business coming from Duluth? And it is simply a question of bargain. We determine what we think we ought to have, and it is a matter of joint conference between your company and our company or other companies interested.

Q. That is, you would take care of the interests of your
146 line, and we either have to accept what is left or go out of business?

A. Well, it is a matter of give and take. We should try to be fair to each other

Q. The same condition of affairs applies at Waseca?

A. Yes, sir; and New Ulm.

The taking of testimony was here discontinued, to be resumed at 10 a. m., September 1.

September 7, 1899, the hearing was resumed pursuant to adjournment.

Messrs. T. D. O'Brien and Ira B. Mills appeared in behalf of the State.

Mr. Armstrong appeared in behalf of defendant St. Paul & Duluth Railroad Company.

Mr. Swan appeared in behalf of defendant Minneapolis & St. Louis Railroad Company.

It is admitted that at all times since the year 1878 and at the present time the legal rate of interest in this State has been and is seven per cent. per annum; that from and after November 1, 1899, the legal rate of interest in this State will be six per cent. per annum.

IRA B. MILLS, recalled in behalf of defendants, testified as follows:

Examined by Mr. SWAN:

Q. (M. & St. L. Ex. A shown to witness.) I will ask you if that is the same blue print which was offered in evidence by the petitioners at the time this case was heard before the railroad and warehouse commission.

A. I think so. Whether it was a blue print that was offered, or something else, I don't know. I guess that is a blue print of the exhibit that was offered. I don't know but what Mr. O'Brien has the original exhibit, but this is the map that was offered in evidence at the time of the hearing, I believe.

Q. Well, it was the same thing as this?

A. Practically so.

147 Q. Will you kindly state what that blue print shows?

A. Well, sir, I can't tell you all it shows. This was prepared by our statistician.

Q. This line here (pointing on the exhibit), does that show the line from Duluth to Minneapolis?

A. The St. Paul & Duluth; I presume so.

Q. And these figures, what is that, the mileage?

A. I think that is the mileage.

Q. And is that the mileage on which you based the local rate between those points?

A. Well, I testified the other day as near as I can to that, and I had at that time a memorandum on which I based my testimony. Now, from this exhibit I can't. The impression I had at that time was that it was 156 and 89, and I think that is correct.

Q. Then the mileage that you figured on was 156 miles from Duluth to Minneapolis?

A. Yes.

Q. That is what you based the rate on?

A. Well, I say we figured that in making the rate—156 miles to Minneapolis and 89 to New Ulm.

Q. Well, it was on that 156 that you based that rate?

A. Yes, sir.

The defendant Minneapolis & St. Louis Railroad Company then rested.

The hearing was then discontinued, to be resumed at 10 a. m. October 11, 1899.

October 11, 1899, the hearing was resumed, pursuant to adjournment.

Messrs. T. D. O'Brien and Ira B. Mills appeared in behalf of the State.

Mr. Armstrong appeared in behalf of the defendant St. Paul & Duluth Railroad Company.

Mr. Clarke appeared in behalf of the defendant Minneapolis & St. Louis Railroad Company.

148 THOMAS YAPP, sworn in behalf of plaintiff, testified as follows:

Examined by Mr. O'BRIEN:

Q. What is your name, please?

A. Thomas Yapp.

Q. And what is your business?

A. Accountant for the railroad commission.

Q. Prior to that time what had been your business?

A. I had been in railroad offices, railroading, principally.

Q. In what capacity?

A. I had been in the general freight agent's office and also in the auditing department.

Q. Have you examined the statements made by Mr. Nay, of the Minneapolis & St. Louis road, showing the gross receipts of that company, the total expenses of the company?

A. I have.

Q. And also the statements made by him as to the receipts and expenses of the various divisions of the road?

A. I have.

Q. State whether or not you have had any other data furnished you aside from the testimony given by Mr. Nay?

A. In what way do you mean?

Q. Were you given a statement by Mr. Nay?

A. Yes, I took the figures which Mr. Nay used before this court some time ago, in evidence.

Q. That is, the table prepared by Mr. Nay, from which he testified?

A. From which he testified, yes.

Q. (State's Ex. 1 shown to the witness.) Please state what that is.

A. This is a statement showing cost of operation, gross earnings, and average cost of operation per ton per mile for the year ending June 30, 1899, taken from figures furnished by the Minneapolis & St. Louis Railroad Company; also a statement showing the
149 estimated cost per ton per mile in Minnesota, on the whole line; also the average receipts per ton per mile in Minnesota, on the whole line, taken from annual reports filed with the railroad and warehouse commission from the year 1890 to date.

Q. Is that statement correct?

A. I believe it to be.

Q. I mean are the computations contained there correct?

A. Yes, sir.

Q. According to the estimates and figures furnished?

A. Yes, sir.

Q. You say that the estimates as to the cost and earnings for prior years, which appear at the foot of State's Ex. 1, were taken from the annual reports of the Minneapolis & St. Louis road filed with the railroad and warehouse commission pursuant to law?

A. Yes, sir.

Mr. O'BRIEN: We offer in evidence Exhibit 1.

Q. (State's Ex. 2 shown to the witness.) Please state what that is.

A. A statement showing cost of operation, gross earnings, and average cost of operation per ton per mile, for the year ending June 30, 1899, taken from the figures furnished by the Minneapolis & St. Louis Railroad Company, applicable to the Western, Pacific & New Ulm divisions.

Q. This statement was compiled from what?

A. From the figures which were used by Mr. Nay in his evidence.

Q. And is, as I understand, first a computation of the cost per ton per mile on each of the three divisions which you have mentioned——

A. Yes, sir.

Q. —and then the average cost per ton per mile on all three of them?

A. Yes, sir.

Q. And are the computations contained in State's Exhibit 2 correct?

A. They are.

150 Mr. O'BRIEN: State's Exhibit 2 is offered in evidence.

Q. (State's Ex. 3 shown to the witness.) Please state what that is.

A. A statement showing mileage, rates, and rates per ton per mile based on rates made by the railroad and warehouse commission in the New Ulm coal-rate case.

Q. What is indicated in the first column of figures?

A. The mileage from Duluth and Minneapolis to the points covered by the commission's order.

Q. Well, the first column is the mileage from Duluth, isn't it?

A. Yes, sir.

Q. The second column is the mileage from Minneapolis?
A. The mileage from Minneapolis; yes.
Q. The third column is what?
A. The third column shows the old rate per ton from Duluth, and the next column shows the commissioners' rate.
Q. The third column is the former rate?
A. The former rate; yes.
Q. Which was put in force voluntarily by the agreement of the Minneapolis & St. Louis and Duluth roads?
A. Yes, sir.
Q. And the fourth column shows what?
A. Shows the rate ordered by the commission.
Q. Now, the fifth column?
A. The fifth column shows the Minneapolis & St. Louis proportion rate per ton from Minneapolis to the points covered by the commissioners' order.
Q. And the sixth column?
A. The sixth column shows the rate per ton per mile—the Minneapolis & St. Louis road's proportion.
Q. And the average rate per ton per mile allowed to the Minneapolis & St. Louis road is what?
A. 1.115 cents.
151 Q. That would be about 11⅛ mills per ton per mile, would it not?
A. Yes, sir.
Q. Now, will you explain the process by which you arrived at the average rate per ton per mile?
A. By adding up the total mileage as shown from Minneapolis to points covered by the commissioners' order, and dividing the sum into the rate per ton that would be earned by the Minneapolis & St. Louis Railroad Company.

Mr. O'BRIEN: State's Exhibit 3 is offered in evidence.

Q. (State's Ex. 4 is shown to the witness.) Please state what State's Exhibit 4 is?
A. It is a statement showing the total number of tons of hard coal received from Duluth for the year ending June 30, 1899; the Minneapolis & St. Louis' proportion of the revenue, and the average rate per ton per mile; also the loss of revenue had the commissioners' rates been put in effect.
Q. Now, that is the actual number of tons of hard coal which the Minneapolis & St. Louis road received from the St. Paul & Duluth during the year ending June 30, 1899, is it?
A. I cannot say, exactly, from the St. Paul & Duluth; but from Duluth proper, all coal shipments.
Q. Oh, from Duluth proper—hauled by the Minneapolis & St. Louis road?
A. Yes, sir.
Q. From whom did you receive this statement?
A. From the general freight agent of the Minneapolis & St. Louis railroad.

Q. Mr. Hopkins?

A. Yes.

Q. And that is the statement which you have just pinned to Exhibit 4?

A. Yes, sir.

152 Q. The blank shows both the stations and the totals, and in these estimates that you have used, you have used the total coal shipments?

A. Yes, sir.

Q. In State's Exhibit 4, the first column indicated what?

A. The mileage from Minneapolis.

Q. The second column?

A. The tons carried.

Q. The third column?

A. The Minneapolis & St. Louis' proportion of rate per ton.

Q. Well, is that as it would be under the order of the commission?

A. Yes, sir.

Q. The fourth column?

A. Tons one mile.

Q. The fifth column?

A. The revenue derived from the tonnage—from the haul.

Q. And the sixth column?

A. The rate per ton per mile.

Q. That is, under the order of the railroad and warehouse commission?

A. Yes, sir.

Q. Then at the bottom of the statement appears the total number of tons hauled, does it?

A. Do you mean the totals as indicated, or the writing at the bottom?

Q. The writing at the bottom?

A. The total tons of hard coal received from Duluth for the year ending June 30, 1899, 2,583 tons. Minneapolis & St. Louis' proportion on the old rate, 2,583 tons, at $1.50, equals $3,874.50. Had the commissioners' rates been in effect for the same period, the Minneapolis & St. Louis' proportion would be $2,464.78; which would show a loss of revenue to the Minneapolis & St. Louis railroad, for the year, of $1,409.72.

Mr. O'BRIEN: We offer State's Exhibit 4 in evidence.

Q. When Mr. Hopkins was upon the stand he gave certain testimony as to the rate charges upon hard coal by the Northern

153 Pacific Railroad Company to Fergus Falls and Breckenridge and some other points in the northern part of the State.

A. Yes, sir.

Q. Since Mr. Hopkins testified, have those rates been changed?

A. Yes, I think they have.

Q. And by the voluntary action of the——

A. Of the Northern Pacific and the Great Northern.

Q. (State's Ex. 5 is shown to the witness.) Please state what State's Exhibit 5 is.

A. A statement showing mileage, rates, and rates per ton per mile on hard coal, from Duluth to stations on the Great Northern and Northern Pacific railways.

Mr. CLARKE: When was this rate put in force?

WITNESS: About the 18th of September, 1899.

Mr. CLARKE: Since the trial of this case was commenced?

WITNESS: Oh, yes, sir.

Q. The first column of State's Exhibit 5 shows what?

A. The first column shows the stations on the Great Northern which I have used in this case.

Q. And the second column?

A. Mileage from Duluth.

Q. From Duluth to these stations?

A. Yes, sir.

Q. The third column?

A. Shows the rates per ton.

Q. And the fourth column?

A. Shows the rate per ton per mile.

Q. Now, on the second half of the page, the first column shows what?

A. Stations on the Northern Pacific railway.

Q. And the second column?

A. The mileage from Duluth to those stations.

Q. Third column?

A. Rate per ton.

Q. And the fourth column?

A. Rate per ton per mile.

154 Q. And that is a statement of the rates that are now in force upon those roads to the points named?

A. Yes, sir.

Q. On hard coal in car-load lots?

A. Yes, sir.

Q. Those figures are taken from what?

A. From the Great Northern amendment to their tariff and also the N. P. tariff.

Q. (Special joint tariff N. P. R'y I. C. C. No. A–1281 shown to the witness.) This is the tariff that was filed in your office, is it?

A. Yes, sir, a copy of it.

Q. And that statement is a correct statement of those rates?

A. Yes, sir.

Mr. O'BRIEN: We offer State's Exhibit 5 in evidence.

Q. (State's Ex. 6 shown to the witness.) Please state what State's Exhibit 6 is.

A. It is a statement showing cost of operation, gross earnings and average cost per ton per mile for the year ending June 30, 1899, for the whole system, taken from figures furnished by the Minneapolis & St. Louis Railroad Company.

Q. State the figures you used in making up that statement.

A. I used the figures as shown in a statement which was handed to me by Mr. Nay.

Q. Did you use the figures given in the statement? Or did you make it up from the statements and figures given by him in his testimony at page 45?

A. Yes, sir.

Q. Taking the figures given by Mr. Nay in his testimony, the total operating expenses are how much?

A. $1,438,004.84.

Q. Taxes how much?

A. $84,700.25.

Q. Trackage and rentals?

A. $55,694.18.

155 Q. Making the total how much?

A. $1,578,399.27.

Q. And you have deducted from that what?

A. Trackage and rentals—$151,708.35.

Q. Making the total net cost how much?

A. $1,426,690.92.

Q. In the net cost have you included the interest paid upon the bonded indebtedness or any dividends upon stock?

A. No, sir.

Q. Those items have been omitted?

A. Yes, sir.

Q. Now, the gross earnings?

A. $2,500,004.36.

Q. And the gross freight earnings?

A. $1,860,257.57.

Q. Percentage of freight to gross earnings?

A. 74.41.

Q. And the proportion of cost of operation chargeable to freight?

A. 74.41 per cent. of $1,426,690.92, being $1,061,600.71.

Q. And the total tons one mile?

A. 156,379,613.

Q. And the average cost per ton per mile?

A. .6789.

Q. Now, have you accepted the items as given by Mr. Nay in his testimony at page 45, with the exception that you have not included the items of interest and dividends? Was it your intention to accept them? What I mean is, was that your idea—that you would accept the items, with the exception that you would omit interest and dividends?

A. Yes, sir.

Q. This is intended to be a statement made from the evidence of Mr. Nay?

A. Yes, sir; just eliminating those particular items.

Q. Just eliminating those particular items and then estimating the cost on your basis?

A. Yes, sir.

Q. Do the items as testified to by Mr. Nay on page 45 ex-

156 actly correspond with the statement furnished you by him, from which you made up State's Exhibit 1?

A. No, they do not agree.

Q. That is, in the statement furnished you, from which you made up State's Exhibit 1, the divisions were separate, were they?

A. Yes, sir.

Q. The total of the divisions stated separately did not agree with the totals as testified to by Mr. Nay at page 45?

A. No, sir.

Q. You have no means of knowing which of them is correct?

A. No, sir.

Q. If the figures stated at page 45 are correct, and if your basis of computation is correct (that is, that the interest and dividends should be eliminated), the average cost per ton per mile for carrying freight, on the whole system of the Minneapolis & St. Louis road, is .6789 cent per ton per mile?

A. Yes, sir.

Q. If the total of the divisions as given to you by Mr. Nay in the statement you have referred to, and as appears in your computation in State's Exhibit 1, is corrrct, and if your method of computation (that is, eliminating interest and dividends) is correct, the average cost per ton per mile for carrying freight upon the entire system of the Minneapolis & St. Louis road is .7094 cent?

A. Yes, sir.

The witness was not cross-examined.

State rests.

FRANK NAY was then recalled in behalf of defendant Minneapolis & St. Louis Railroad Company and testified as follows:

Examined by Mr. CLARKE:

Q. You have heard the testimony of the witness, Mr. Thomas Yapp?

A. Yes, sir.

157 Q. I will ask you to explain now, in your own way, the apparent differences between the computations made by Mr. Yapp and yourself.

A. There is an apparent discrepancy in the total operating expenses, total gross earnings and total freight earnings. That is to say, the sum of the six divisions added together aggregate more than the total operating expenses, gross earnings and freight earnings of the Minneapolis & St. Louis railroad. This is accounted for by the fact that, in the statement by divisions, the Pacific division (which was acquired by the Minneapolis & St. Louis Railroad Company on February 20, 1899,) is shown in full for the entire year; the earnings and expenses are shown for the entire year ending June 30, 1899——

Q. That is the fiscal year?

A. That is the fiscal year.

Q. The statement to which you have been referring is the one marked State's Exhibit 1?

A. Yes, sir.

Q. Now, go on.

A. ——while in the statement marked State's Exhibit 6, only the actual operating expenses and earnings of the Minneapolis & St. Louis railroad are included. The Minneapolis & St. Louis railroad did not include the Pacific division prior to February 20, nor the New Ulm division (or Southwestern division, as it is shown here) prior to March 1.

Q. Why?

A. Because before March 1st the road was a separate, independent corporation, operated entirely separate and distinct.

Q. It did not own these two roads—the Minneapolis, New Ulm & Southwestern and what is known as the Pacific division?

A. That is true—which was formerly the Wisconsin, Minnesota & Pacific railway. And for that reason there is an apparent discrepancy. The statement marked State's Exhibit 6 is based on
158 the earnings of the Minneapolis & St. Louis railroad as a corporation, while the statement marked Exhibit 1, in order to show correct averages, necessarily included the entire year, although the earnings for the greater portion of the year, on the Pacific division and New Ulm division, accrued to other companies. And the same is true of expenses.

Cross-examination.

By Mr. O'BRIEN:

Q. So the result is, Mr. Nay, that both of those statement are correct in themselves?

A. Yes, sir.

Q. And which statement would you say would most nearly show the average cost per ton per mile of carrying freight on the Minneapolis & St. Louis system as now constituted?

A. I should say that the statement covering the entire year; because conditions are different during the year. When business is extremely heavy, the cost of operation per ton per mile is less than when it is light, and in order to obtain a fair average it is necessary to take twelve months, so as to get all of the conditions of the year.

Q. Yes, but is it not also true that the cost of operating the Pacific division will be lessened because of the fact of its consolidation with the general system?

A. I do not think so.

This closed the testimony.

It is agreed that on March 3rd, 1899, the Minneapolis & St. Louis Railroad Company cancelled and withdrew from the joint tariff previously made with the St. Paul & Duluth Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company for the transportation of hard coal from Duluth to the points
159 named in Schedule A, and this defendant has not at any time since said last-named date had any joint rate or agreement with said St. Paul & Duluth Railroad Company for the transportation of hard coal from Duluth to said points, and has no such joint

rate or agreement and has at all times declined and refused and now declines and refuses to enter into such joint tariff or agreement.

It is admitted that the railroad and warehouse commission made and promulgated the orders attached to the petition for the alternative writ of mandamus, and that publication thereof was made as stated in the petition.

Afterwards on October 23d, 1899, said cause was brought on before said court upon the petition of the railroad and warehouse commission of the State of Minnesota, together with the exhibits attached thereto, the alternative writ of mandamus issued on said petition, and the answers to said alternative writ of mandamus, and the evidence taken before the official stenographer of said court hereinbefore set forth, and the stipulations and agreements therein contained.

All of said parties duly appearing at said time, the following proceedings were had:

First. The relator moved that all the testimony be stricken out for the reason that no issue of fact was made by the pleadings, and there was no question of fact in controversy in this proceeding for the reason that the findings of the commission and the orders made by it not having been appealed from are conclusive; which motion was overruled and an exception noted.

Second. The relator moved to strike out the testimony of
160 Frank Nay on pages 14, 45 and 46 of the transcript of said evidence as to the cost of the Minneapolis & St. Louis railroad, and the amount of bonds and the amount of capital stock of said road, as being incompetent, irrelevant and immaterial and hearsay, and for the reason that the same furnishes no basis for computing rates; which said motion was denied and exception noted.

Third. To strike out the testimony of Ira B. Mills on pages 60, 61, 62, 99 and 100, of said transcript, upon the ground that the same was incompetent, irrelevant and immaterial; which said motion was denied and exception noted.

And thereupon said cause being argued by the respective counsel the same was fully submitted to the court.

On Monday, January 29, 1900, said court made and filed the following findings of fact and conclusions of law:

Findings of Fact.

Each of the facts stated and alleged in said petition and in the exhibits attached thereto, is true.

The joint through rates fixed by said commission as shown by Exhibit "B," attached to said petition, are not unreasonable or confiscatory, nor is the proportion of said joint rates allowed to either defendant under the order of said commission unreasonable.

Save as aforesaid, the allegations of fact contained in the answers of defendant are not proven.

Conclusions of Law.

The several acts and orders of said commission set forth in
161 said petition and said exhibits are valid and binding upon the defendants; and the rates so fixed by said commission *prima facie* reasonable.

The defendants have not proved that such rates are unreasonable.

The plaintiff is entitled to a writ of mandamus as prayed for in said petition.

It is therefore ordered and directed: that the clerk of this court forthwith issue a peremptory writ of mandamus, directed to the defendant railroad companies and each of them, commanding and directing that they and each of them forthwith adopt and publish and keep for public inspection, as provided by law, as the joint through rates to be charged by them as freight for the hauling of hard coal in car-load lots from the city of Duluth, Minnesota, to the points hereinafter named, the following rates and charges, to wit:

	Rate per ton.
Hopkins	$1.32
Minnetonka	1.35
Deephaven	1.38
Excelsior	1.40
Waconia	1.51
Young America	1.56
Norwood	1.57
Hamburg	1.62
Green Isle	1.63
Arlington	1.68
Gaylord	1.75
Winthrop	1.80
Lafayette	1.86
Klossner	1.91
New Ulm	1.95
Gibbon	1.87
162 Fairfax	1.96
Franklin	2.01
Morton	2.05
Redwood	2.11
Delhi	2.15
Belview	2.21
Echo	2.23
Wood Lake	2.29
Hanley Falls	2.33
Hazel Run	2.38
Clarkfield	2.42
Boyd	2.48

and that they make and file with the railroad and warehouse commission copies of said schedules, rates and fares and charges, and that from and after the receipt of this writ they receive, haul and

transport hard coal in car-load lots from the city of Duluth to the points and stations above named at and for the rate, fare and charge herein set forth; and that for the carrying of such freight no higher or greater rate shall be asked, demanded or received by either of them; and that said respective amounts shall be charged and received as the joint through rate to be charged for such service, and shall be divided between them, the said defendant companies, as Exhibit "C," attached to the petition herein, provides and orders, and that they comply in all other respects with the said orders of said railroad and warehouse commission, copies of which are attached to the petition herein.

GEORGE L. BUNN,
District Judge.

January 27, 1900.

163 *Memorandum.*

I have carefully studied the evidence and the exhaustive briefs of counsel and believe that the conclusions I have reached, as noted below, are right.

(1.) The contention of the plaintiff that the action of the commission is final and conclusive, when no appeal is taken, is unsound. As I ruled on the hearing, the rates fixed by the commission are merely *prima facie* reasonable, and the defendants may offer testimony and prove, if they are able to, that the rates are unreasonable and confiscatory.

(2.) The general power of the State to control and regulate railroad rates is firmly established. This power being conceded, I think that the law giving the commission power to fix a joint rate for connecting carriers, and to apportion this rate between them in case they fail to agree upon a division, is within and a legitimate exercise of the general power, and that the law is therefore constitutional. The Jacobson case, in my opinion, is decisive on this question in this State, and, independently of that authority, I believe the law valid.

(3.) We have, then, this case: The commission had the power to establish and fix the joint rate to be received by the defendants for the transportation of coal in car-load lots from Duluth to the points named in the schedule. After a hearing, it did so. The rates thus established are *prima facie* reasonable, and the burden of proof is upon the railroad companies to prove that they are unreasonable and confiscatory. Unless the defendants have sustained this burden, and shown by a fair preponderance of the evidence that the rates
164 so fixed are unreasonable, the relief asked in the petition should be granted and a peremptory writ of mandamus issued.

I am of the opinion that the defendants have wholly failed to prove that the rates fixed are unreasonable. While it may be the fact that the rates fixed are less than the cost of transportation as claimed by the defendants, the evidence does not show it. It is perhaps proved that the cost of carrying all freight is greater than the revenue the Minneapolis & St. Louis Company would derive if the

rate fixed by the commission for "coal in car-load lots" was to be applied to all freight. But "coal in car-load lots" is a comparatively insignificant item in the total freight carried by the company, and it must be conceded that the cost of transporting coal in car-load lots per ton per mile is considerably less than the average cost for all freight. It is not only shown by the testimony what the cost per ton per mile for carrying hard coal in car-load lots is, but there is no testimony in the record that enablas me to make even a fair guess as to what it is, or as to whether it is less or greater than the rate per ton per mile allowed under the rates fixed by the commission. In other words, proof of the cost per ton per mile of transporting all freight furnishes no data from which I am able to estimate the cost per ton per mile of transporting "hard coal in car-load lots." This cost being unknown, it is impossible to say that the rates fixed by the commission will not yield the company a fair revenue.

BUNN, *J.*

The above and foregoing case and bill of exceptions having been presented to me, the court who tried the same, within the time for settlement and allowance thereof, and having been found con-
165 formable to the facts, and having been by me found to be true, and as containing all the evidence and proceedings herein, the same is hereby settled and allowed as and for the settled case and bill of exceptions in said case.

GEORGE L. BUNN,
Judge of District Court.

Dated February 10th, 1900.

(Title of Cause.)

To W. B. Douglas, attorney general, and C. D. & Thos. D. O'Brien, attorneys for complainant:

Please take notice that the settled case and bill of exceptions heretofore proposed by the above-named defendant, which has been served upon you, together with such amendments as may be served by you, will be presented to the Hon. George L. Bunn, one of the judges of said court, at the court-house in the city of St. Paul, Ramsey county, Minnesota, on the 10th day of February, A. D. 1900, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for the allowance and settlement of said proposed case and bill of exceptions, and for the certificate and signature of said judge thereto.

You will also please take notice that then and there and immediately after the allowance of said settled case and bill of exceptions and the signature of the judge thereto, the defendant will, upon the files, pleadings, records and all the proceedings had in said action, and upon the settled case herein, move the court to order and direct a new trial herein upon the following grounds:

166 1st. That the decision is not justified by the evidence; is not in accord with the evidence, and is against the great weight of the evidence.

2d. That the evidence shows conclusively that the rate or tariff fixed by the board of railroad and warehouse commissioners for the

transportation of hard coal to the points named in the petition for the alternative writ of mandamus is unreasonably low and does not afford this defendant, The Minneapolis & St. Louis Railroad Company, reasonable compensation for the service rendered.

3d. Because the decision is contrary to law.

4th. Because it appears that the acts of the State legislature of the State of Minnesota, pursuant to which the order of the board of railroad and warehouse commissioners was made, is in conflict with and violative of the provisions of the fourteenth amendment to the Constitution of the United States.

5th. Because the court committed error in denying defendant's motion for judgment made and filed before said trial was had.

6th. Because of errors occurring at the trial and duly excepted to by this defendant.

ALBERT E. CLARKE,
Attorney for the Minneapolis & St. Louis Railroad Company.

Dated February 5th, 1900.

(Title of Cause.)

Now comes The Minneapolis & St. Louis Railroad Company, one of the respondents in the above-entitled action, and moves the
167 court to set aside the decision heretofore rendered in this action and grant a new trial herein on the following grounds:

1. That the decision is not justified by the evidence; is not in accord with the evidence, and is against the great weight of the evidence.

2. That the evidence shows conclusively that the rate or tariff fixed by the board of railroad and warehouse commissioners for the transportation of hard coal to the points named in the petition for the alternative writ of mandamus is unreasonably low and does not afford this defendant, The Minneapolis & St. Louis Railroad Company, reasonable compensation for the service rendered.

3. Because the decision is contrary to law.

4. Because it appears that the acts of the State legislature of the State of Minnesota, pursuant to which the order of the board of railroad and warehouse commissioners was made, is in conflict with and violative of the provisions of the fourteenth amendment to the Constitution of the United States.

5. Because the court committed error in denying defendant's motion for judgment made and filed before said trial was had.

6. Because of errors occurring at the trial and duly excepted to by this defendant.

ALBERT E. CLARKE,
Attorney for the Minneapolis & St. Louis Railroad Company.

Dated February 10th, 1900.

(Title of Cause.)

168 The motion of the respondent, The Minneapolis & St. Louis Railway Company, in the above-entitled action, came

on duly to be heard before this court at special term February 10th, 1900. Having duly considered the same, it is

Ordered, that said motion be, and the same is hereby denied.

GEORGE L. BUNN,
District Judge.

February 10, 1900.

(Title of Cause.)

This action having been duly tried by the above-entitled court and Honrable George L. Bunn, one of the judges of said court, having duly filed findings of fact and conclusions of law from which it appears that the plaintiff is entitled to the relief demanded in said complaint and to the directions and mandates hereinafter recited:

Now, therefore, pursuant thereto and on motion of W. B. Douglas, Esq. attorney general of the State of Minnesota, and Messrs. C. D. and Thos. D. O'Brien, it is

Ordered, adjudged and decreed, that the defendants and each of them forthwith adopt and publish and keep for public inspection as provided by law as the joint through rate to be charged by them as freight for the hauling of hard coal in car-load lots from the city of Duluth, Minnesota, to the points hereinafter named, the following rates and charges, to wit:

		Rate per ton.
	Hopkins	$1.32
	Minnetonka	1.35
169	Deephaven	1.38
	Excelsior	1.40
	Waconia	1.51
	Young America	1.56
	Norwood	1.57
	Hamburg	1.62
	Green Isle	1.63
	Arlington	1.68
	Gaylord	1.75
	Winthrop	1.80
	Lafayette	1.86
	Klossner	1.91
	New Ulm	1.95
	Gibbon	1.87
	Fairfax	1.96
	Franklin	2.01
	Morton	2.05
	Redwood	2.11
	Delhi	2.15
	Belview	2.21
	Echo	2.23
	Wood Lake	2.29
	Hanley Falls	2.33
	Hazel Run	2.38
	Clarkfield	2.42
	Boyd	2.48

and that they and each of them make and file with the railroad and warehouse commission copies of said schedules, rates, fares and charges.

That of the said freights so to be received by said defendants for said services as aforesaid, the defendant, The St. Paul & Duluth Railroad Company, shall have and retain as its compensation for
170 its services in the carriage of said coal over its line of road and the delivery of the same to the Minneapolis & St. Louis Railroad Company, the sum of one dollar ($1.00) per ton; and the said defendant, The Minneapolis & St. Louis Railroad Company shall receive the balance of the total amount herein allowed, as its compensation for the receiving of said coal from said St. Paul & Duluth Railroad Company and the carriage of the same upon its line of road.

Ordered, further, that a peremptory writ of mandamus directed to said defendants and each of them issue out of and under the seal of this court, ordering and directing said defendants and each of them to haul and transport hard coal in car-load lots from the city of Duluth to the points and stations above named at and for the rate, fare and charge hereinbefore set forth; and that for the carrying of such freight no higher or greater rate shall be asked, demanded or received by either of them; and that said respective amounts shall be charged and received as the joint through rate to be charged for such service, and shall be divided between them, the said defendant companies, as hereinbefore provided, and that said defendant railroad companies comply in all other respects with those certain orders of said railroad and warehouse commission, copies of which are attached to the petition filed with the court in this action, marked respectively Exhibit B and Exhibit C.

Signed this 15th day of February, A. D. 1900.

EDWARD G. ROGERS, *Clerk.*

(Seal of Dist. Ct.)

171 (Title of Cause.)

Notice of Appeal.

To W. B. Douglas, attorney general, and C. D. & Thos. D. O'Brien, attorneys for the above-named plaintiff, and to Edward G. Rogers, clerk of said district court:

Please take notice, that the above-named defendant, The Minneapolis & St. Louis Railroad Company, appeals to the supreme court of the State of Minnesota, from that certain order of the said district court entered herein, on the tenth day of February, A. D. 1900, denying the motion of said defendant for a new trial and from the judgment entered herein on the 15th day of February, 1900, in favor of said plaintiff and against said defendant, by which it is ordered and adjudged that a peremptory writ of mandamus issue out of and under the seal of said district court, ordering and directing the defendants to transport hard coal in car-load lots from the city of Du-

luth to certain points and stations named in said judgment at and for the rates and tariff therein specified, and from the whole thereof.

Dated this 16th day of February, A. D. 1900.

ALBERT E. CLARKE,
Attorney for Defendant, The Minneapolis & St. Louis Railroad Co.

Service duly admitted.

Bond on appeal approved, served and filed.

172 (Title of Cause.)

Stipulation.

It is hereby stipulated that the original exhibits offered and received in evidence on the trial of this case in the district court shall be transmitted and returned to the supreme court as part of the return on appeal. That such original exhibits may be used by either party upon the hearing of said appeal in the supreme court. That neither party shall be required to incorporate copies of such exhibits into the paper book. Either party may, however, incorporate or print any part of said exhibits in the brief filed in the supreme court.

C. D. AND THOS. D. O'BRIEN,
Attorneys for Relator,
ALBERT E. CLARKE,
Att'y for the Minneapolis & St. Louis Railroad Co.

Dated February 13, 1900.

(Here follows blue print marked p. 173.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Statement Showing Cost of Operation, Gross Earnings, and Average Cost of Operation per Ton per Mile for Year Ending June 30th, 1899, Taken from Figures Furnished by the Minneapolis and St. Louis Railroad Company.

	St. Paul div'n.	Western div'n.	Pacific division.	New Ulm div'n.	Albert Lea div'n.	Southern division.	Totals.
Operating expenses	$92,650.53	$219,266.13	$153,728.99	$29,384.87	$708,395.33	$350,882.85	$1,554,308.70
Taxes paid	1,813.23	19,120.82	10,318.75	399.77	38,448.30	22,043.14	92,144.01
Rentals paid	54,254.18	" " "	" " "	" "	1,440.00	" " "	55,694.18
Total operating expenses	$148,717.94	$238,386.95	$164,047.74	$29,784.64	$748,283.63	$372,925.99	$1,702,146.89
Deduct:							
Trackage and rentals received	13,099.80	" " "	" " "	" " "	135,488.55	3,120.00	151,708.35
Net cost	$135,618.14	$238,386.95	$164,047.74	$29,784.64	$612,795.08	$369,805.99	$1,550,438.54
Gross earnings	$57,351.42	$603,554.72	$264,921.44	$33,884.10	$1,219,163.70	$532,469.51	$2,711,344.89
Freight earnings	41,310.22	475,771.82	203,006.92	21,715.19	906,939.68	376,755.98	2,025,499.82
Per cent. of freight to gross earnings	72.03 %	78.83 %	76.63 %	64.09 %	74.39 %	70.76 %	Avg. 74.70 %
Prop'n of cost of operation chargeable to freight	97,685.75	187,920.43	125,709.78	19,088.97	455,858.26	261,674.72	1,158,177.59
Total tons one mile	1,941,846	26,901,460	9,414,681	675,831	89,524,755	34,797,490	163,256,063
Average cost per ton per mile	ct. 5.031	ct. .6986	ct. 1.335	ct. 2.825	ct. .5092	ct. .7520	ct. .7094

	Years	1890.	1891.	1892.	1893.	1894.	1895.	1896.	1897.	1898.	1899.
		ct.	ct.	ct.	ct.	ct.	ct.	ct.	ct.	ct.	ct.
Estimated cost per ton per mile in Minnesota		.684	.671	.695	.680	.....	.....	not shown.		.....	....
" " " " " " whole line		.727	.743	.736	.709	.....	.....	not shown.		.....	.....
Average receipts " " " " in Minnesota		1.338	1.398	1.492	1.313	1.233	1.338	1.315	1.303	1.194	1.220
" " " " " " whole line		1.430	1.406	1.486	1.330	1.267	1.332	1.328	1.283	1.171	1.190

New Ulm rate case, Sept'r 21st, 1899.

175 Ex. 2.

Statement Showing Cost of Operation, Gross Earnings, and Average Cost of Operation per Ton per Mile for Year Ending June 30th, 1899, Taken from Figures Furnished by the Minneapolis and St. Louis R. R. Company.

	Western division.	Pacific division.	New Ulm division.	Totals.
Operating expenses	$219,266.13	$153,728.99	$29,384.87	$402,379.99
Taxes paid	19,120.82	10,318.75	399.77	29,839.34
Rentals paid				
Total operating expenses	$238,386.95	$164,047.74	$29,784.64	$432,219.33
Gross earnings	$603,554.72	$284,921.44	$33,884.10	$902,360.26
Freight earnings	475,771.83	203,006.92	21,715.19	700,493.94
Per cent. of freight to gross earnings	78.83 %	76.63 %	64.09 %	Avg. 77.63 %
Prop'n of cost of operation chargeable to freight	$187,920.43	$125,709.78	$19,088.97	$335,531.86
Total tons, one mile	26,901,460	9,414,681	675,831	36,991,972
Average cost per ton per mile	ct. .6986	ct. 1.335	ct. 2.825	ct. .907

176 Pl'ff's Ex. 3.

Statement Showing Mileage, Rates, and Rates per Ton per Mile, Based on Rates Made by R. R. & W. H. Commission in New Ulm Coal-rate Case.

From Duluth to—	Mileage from— Duluth.	Mileage from— M'p'lis.	Rates per ton, 2,000 lbs., from Duluth. Old rate.	Rates per ton, 2,000 lbs., from Duluth. Comm'n rate.	M. & St. L. prop'n. Rate per ton.	M. & St. L. prop'n. Rate per ton per mile.
Hopkins	171	9	$1.75	$1.32	$ .32	$3.556
Minnetonka, M.	174	12	2.00	1.35	.35	2.917
Deephaven	177	15	2.00	1.38	.38	2.533
Excelsior	181	19	2.10	1.40	.40	2.105
Waconia	194	32	2.35	1.51	.51	1.594
Young America	201	39	2.45	1.56	.56	1.436
Norwood	202	40	2.50	1.57	.57	1.425
Hamburg	206	44	2.50	1.62	.62	1.410
Green Isle	210	48	2.50	1.63	.63	1.313
Arlington	217	55	2.50	1.68	.68	1.236
Gaylord	226	63	2.50	1.75	.75	1.190
Winthrop	232	70	2.50	1.80	.80	1.143
Lafayette	239	77	2.50	1.86	.86	1.117
Klossner	246	83	2.50	1.91	.91	1.096
New Ulm	251	89	2.50	1.95	.95	1.067
Gibbon	240	78	2.50	1.87	.87	1.115
Fairfax	249	87	2.50	1.96	.96	1.105
Franklin	257	95	2.50	2.01	1.01	1.063
Morton	263	101	2.50	2.05	1.05	1.040
Redwood	269	107	2.50	2.11	1.11	1.037
Delhi	275	113	2.50	2.15	1.15	1.018
Belview	280	118	2.50	2.21	1.21	1.025
Echo	285	123	2.50	2.23	1.23	1.000
Wood Lake	292	130	2.50	2.29	1.29	.992
Hanley Falls	297	135	2.50	2.33	1.33	.985
Hazel Run	303	141	2.50	2.38	1.38	.979
Clarkfield	308	146	2.50	2.42	1.42	.980
Boyd	316	153	2.50	2.48	1.48	.967
		2,222			24.78	

M. & St. L. average rate per ton per mile, ct., 1.115.

177 EX. 4.

Statement Showing Total Number of Tons of Hard Coal Received from Duluth for Year Ending June 30th, 1899—M. & St. L. R. R. Proportion of Revenue and Average Rate per Ton per Mile; also Loss of Revenue Had Commissioners' Rates Been in Effect.

From Duluth to—	Miles from M'plis.	Tons carried.	M. & St. L. prop'n of rate per ton.	Tons one mile.	Revenue.	Rate per ton per mile.
Green Isle	48	20	$ .63	960	$12.60	ct. 1.312
Gaylord	63	99	.75	6,237	74.25	1.190
Winthrop	70	642	.80	44,940	513.60	1.143
Lafayette	77	15	.86	1,155	12.90	1.117
New Ulm	89	1,154	.95	102,706	1,096.30	1.067
Gibbon	78	27.5	.87	2,145	23.93	1.115
Fairfax	87	218	.96	18,966	209.28	1.103
Franklin	95	31	1.01	2,945	31.31	1.063
Morton	101	71	1.05	7,171	74.55	1.040
Redwood	107	15	1.11	1,605	16.65	1.037
Echo	125	51	1.23	6,273	62.73	1.000
Wood Lake	130	47.5	1.29	6,175	61.28	.993
Hazel Run	141	18	1.38	2,538	24.84	.979
Clarkfield	146	116	1.42	16,936	164.72	.973
Boyd	153	58	1.48	8,874	85.84	.967
Totals		2,583		229,626	$2,464.78	ct. 1.073 av.

Total tons of hard coal received from Duluth for year ending June 30th, 1899, 2,583 tons.

M. & St. L. R. R proportion on old rate, 2,583 tons, @ 1.50 ..... $3,874.50
Had commissioners' rates been in effect for same period, M. & St. L. R. R. proportion would be 2,464.78

Loss of revenue to M. & St. L. R. R. for year $1,409.72

178 STATE'S EX. 5.

Statement Showing Mileage, Rates, and Rates per Ton per Mile on Hard Coal from Duluth to Stations on Great Northern and Northern Pacific R'ys.

Great Northern R'y.				Northern Pacific R'y.			
To—	Miles.	Rate per ton.	Rate per ton per mile.	To—	Miles.	Rate per ton.	Rate per ton per mile.
Nickerson	33	1.25	3.787	Sawyer	38	.80	2.105
Kerrick	40	"	3.125	Corona	44	.90	2.045
Bruno	48	"	2.604	Cromwell	50	.95	1.900
Partridge	56	"	2.232	Wright	56	1.00	1.786
Sandstone	63	"	1.984	Tomahawk	62	1.10	1.774
Brook Park	80	"	1.562	McGregor	71	1.20	1.690
Mora	91	"	1.374	Kimberley	81	1.20	1.481
Tosca	106	"	1.179	Rossburg	85	1.25	1.471
Milaca	111	"	1.126	Aitkin	91	1.25	1.374
Bridgman	114	1.60	1.403	Cedar Lake	96	1.30	1.354
Oak Park	120	"	1.333	Deerwood	101	1.40	1.386
Foley	125	"	1.280	Jonesville	111	1.45	1.306
St. Cloud	139	"	1.151	Brainerd	118	1.50	1.271
Collegeville	149	2.00	1.342	Baxter	123	1.55	1.260
Avon	155	"	1.290	Sylvan Lake	128	1.60	1.250
Albany	161	"	1.242	Pillager	132	1.65	1.250
Freeport	167	"	1.197	Motley	140	1.75	1.250
Melrose	173	"	1.156	Staples	148	1.85	1.250
Sauk Centre	181	"	1.104	Downer Lake	150	1.85	1.233
West Union	189	"	1.058	Aldrich	155	1.90	1.226
Osakis	195	"	1.026	Verndale	159	1.95	1.226
Nelson	201	"	.995	Wadena	165	2.00	1.212
Alexandria	206	"	.971	New York Mills	178	2.15	1.208
Brandon	219	"	.913	Perham	189	2.25	1.190
Evansville	224	2.05	.915	Lucel	194	"	1.160
Melby	228	2.10	.921	Frazee	200	"	1.125

Statement Showing Mileage, &c.—Continued.

Great Northern R'y.				Northern Pacific R'y.			
To—	Miles.	Rate per ton.	Rate per ton per mile.	To—	Miles.	Rate per ton.	Rate per ton per mile.
Ashby	233	2.15	.923	McHugh	205	2.25	1.098
Parkdale	247	2.25	.911	Detroit	210	"	1.071
Fergus Falls	252	"	.893	Audobon	217	"	1.037
Carlisle	260	"	.865	Lake Park	222	"	1.014
Rothsay	268	"	.839	Winnipeg Jct.	230	"	.978
Lawndale	275	"	.818	Hitterdal	236	"	.953
Barnesville	282	"	.798	Syre	250	"	.900
Downer	290	"	.776	Gary	264	"	.852
Glyndon	301	"	.750	Fertile	276	"	.815
Averill	306	"	.735	Tilden	287	"	.784
Felton	314	"	.717	Red Lake Falls	310	"	.726
	6,601	68.45	1.037 av.		5,772	65.05	1.127 avg.

179 Statement showing cost of operation, gross earnings, and average cost per ton per mile for year ending June 30, 1899, for the whole system, taken from figures furnished by the M. & St. L. R'y.

Operating expenses	$1,438,004.84
Taxes	84,700.25
Trackage and rentals	55,694.18
	1,578,399.27
Deduct trackage and rentals	151,708.35
Net cost	1,426,690.92
Gross earnings	2,500,004.36
Freight "	1,860,257.57
Per cent. of freight to gross earnings	74.41
Proportion of cost of operation chargeable to freight, 74.41 % of $1,426,690.92	1,061,600.71
Total tons one mile	156,379,613
Average cost per ton per mile	.6789

State's Ex. 6.

180 12111.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

STATE OF MINN. *ex Rel.* R. R. & WAREHOUSE Commission, Respondent,
vs.
MPLS. & ST. LOUIS R. R. CO. ET AL., Defendants; Mpls. & St. Louis R. R. Co., Appellant.
No. 207. Syllabus.

1. On the hearing in district court upon an application for a writ of mandamus to compel a common carrier to obey and comply with an order fixing a tariff of rates made by the State railroad and warehouse com. the carrier is entitled to an examination of matters of fact in which evidence *de novo* may be taken. Under the provisions of G. S. 1894, sec. 393, such an order is not conclusive as to the reasonableness of the tariff in the absence of an appeal therefrom.
2. Held, following Jacobson *v.* R'y Co., 71 Minn., 519, that such part of L. 1895, ch. 91, as authorizes said commission to establish by order joint through rates for the transportation of freight over any two or more connecting lines of railway within this State and to compel obedience thereto does not violate any of the constitutional provisions, Federal or State.
3. Held, that when estimating the cost of operating a railway per ton of freight per mile of carriage for the purpose of determining the reasonableness of a tariff of rates fixed by the commission it is error to take into consideration an amount of the earnings which has been appropriated and paid out as dividends on stock shares of such railway.
4. When considering the reasonableness of such rates the commission and the courts are justified in taking into consideration what is known as a "commercial necessity," namely, the application of principles when fixing rates which are forced upon common carriers by various conditions and circum-
181 stances and are in common practice among them, a business policy which actuates and influences the carriers themselves to disregard a rule of strict comparison and strict equality as between bulk or weight or value as well as distance of carriage.
5. G. S. 1894, sec. 381, subd. C; *id.*, sec. 392, subd. A, and L. 1895, ch. 91, sec. 3, subd. C, provides that the tariff of rates made by the commission shall be taken by the courts as *prima facie* evidence that such tariff is equal and reasonable, the burden being on the carrier to show to the contrary.

Held, on the proofs in this action, whether the rule laid down in Steenerson *v.* G. N. R'y Co., 69 Minn., 353, as a basis for ascertaining what are reasonable rates be applied, or the rule of greater value to defendant carrier, announced in Smyth *v.*

Ames, 169 U. S., 466, that defendant did not rebut and overcome the *prima facie* character of the tariff in question, which was upon coal in car-load lots.

6. Courts cannot assume that the cost of reproduction of a line of railway or that the present as compared with the original cost of construction is the amount of stock and bonds outstanding or that it is what the road has cost up the time of the trial.

182 12111.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

STATE OF MINN. *ex Rel.* R. R. & WAREHOUSE Commission, Respondent,
vs.
MINN. & ST. LOUIS R. R. CO. ET AL, Def'ts; Minn. & St. Louis R. R. Co., Appellant.
} No. 207. Opinion.

The St. Paul & Duluth Railroad Company operates a line of railroad from Duluth, Minnesota, to the cities of St. Paul and Minneapolis, Minnesota. The Minneapolis & St. Louis railway operates a line of railroad from the cities of St. Paul and Minneapolis to the various points in the State of Minnesota designated in the order of the railroad and warehouse commission which is under consideration in this case. Both of the defendants are fully equipped to conduct the business of common carriers of freight, have complete track connection and transfer facilities at the cities of St. Paul and Minneapolis, and for a long time have been engaged in transporting hard coal in car-load lots without change of cars from Duluth to the points upon the line of the Minneapolis and St. Louis road for a joint through rate, which had been established by the mutual agreement of the defendants and which had been divided between the defendants according to that agreement.

On the 22nd day of September, 1898, the railroad and warehouse commission of this State under a resolution entered upon the investigation of the reasonableness of said joint rate for hard coal in car-load lots so established by the defendant. The defendants
183 duly appeared and took part in the investigation, and on the 19th day of January, 1899, the railroad and warehouse commission made an order establishing a joint through rate for the commodity in question, known herein as Schedule B. After the due publication and service of the order the defendants failed to agree upon a division of the rate ordered by the commission, and the Minneapolis & St. Louis Railroad Company withdrew all tariffs on hard coal in car-load lots, which had been established under the agreement with the Duluth road. The railroad and warehouse commission, having cited the defendants to appear, made the order of April 8th, 1899, directing how the joint through rate should be divided between the defendants. The orders of the commission were duly

promulgated and published as provided by law. No appeal was taken therefrom.

Neither of the defendants filed or posted schedules of the new tariff, and the defendant The Minneapolis and St. Louis Railroad Company refused to receive or transport coal under the order of the commission, and this proceeding was commenced in the district court of Ramsey county to compel the defendants to comply with such orders.

After a trial, judgment was entered confirming the orders of the railroad and warehouse commission and commanding the issuance of a peremptory writ, as demanded in the petition filed in this proceeding.

This appeal is from a judgment entered in accordance and also from an order previously made denying a motion for a new trial made by defendant R'y Co.

1. We are of opinion that the contention of counsel for the relator board that the order complained of is conclusive in the absence of appeal therefrom is without merit. G. S. 1894, sec. 393, provides for an appeal from the commission to the district court, and that

"upon such appeal and upon the hearing of any application
184 by the commission or by the attorney general for the enforcement of any order made by the commission, the district court shall have jurisdiction to, and it shall examine the whole matter in controversy, *including matters of fact* as well as questions of law, and to affirm, modify, or reverse such order in whole or in part as justice may require," and that "the remedies herein provided for shall be in addition to all existing legal remedies." Evidently more than one remedy is contemplated. No effect would be given to the language we have italicised if it was not intended that in a proceeding like this to enforce an order made by the commission there should be just such a trial as there would be if an appeal had been taken from the order. On such appeal the court will examine matters of fact to ascertain whether there is any evidence reasonably tending to support the disputed findings of fact, taking evidence *de novo*. Steenerson *v.* R'y Co., 69 Minn., 353. It may not have been necessary, in view of the amendment G. L. 1891, chap. 106, requiring that notice of a hearing should be given by the commission, that any hearing in these courts should be had on the merits except on appeal, but that is not the question. It is simply one of statutory construction.

It was not incumbent upon the defendant to appeal from the order that it might have an investigation on the facts.

2. As stated by counsel for the railway company, the substantial questions involved are two. One is the validity of the law pursuant to which the order of the commission was made and the judgment appealed from entered, and the other is the validity and correctness of the action of the court below whereby it affirmed and sustained the said order. The latter question is a very serious one under any circumstances and will continue so to be until we have more definite utterances on the subject from the Supreme Court of the U. S.,

the tribunal in which the constitutional questions involved must finally be determined.

185 3. As to the first of those questions, a joint rate for car-load lots of coal, both hard and soft, had been agreed upon between the railway lines affected by the order and had been put in effect some time prior to any action on the part of the commission and earnings thereunder were divided between the carriers participating in the transportation. The tariff rate for coal per ton from Duluth to the first station south of Minneapolis (Hopkins), about nine miles, and on defendant's line of road, was $1.75. To Norwood, a trifle over 40 miles from Minneapolis, it was $2.50. It was the same to the stations southerly, 21 in number, the one most southerly being Boyd, 152 miles distant from Minneapolis or about 112 miles beyond Norwood—that is, the rate agreed upon was the same per ton in car-load lots whether it was transported to a station forty miles south of Minneapolis or to another station 152 miles distant; and of this agreed rate it was stipulated by the railway companies that the carrier from Duluth to Minneapolis should receive $1.00 per ton, distance 162 miles. We refer to these figures for the purpose of calling attention to what is evidently a fact that the defendant was either carrying coal to Boyd at a loss or was collecting too much tariff per ton on the same article transported to Norwood. We presume that these regulations as to rates were compelled by what one of defendant's witnesses called "commercial conditions" which made them necessary—not unlike those conditions referred to by the writer in a concurring opinion in Steenerson *v.* G. N. R'y Co., *supra*, which permit or compel a discrimination between places and commodities where railway officials make schedules of rates for the transportation of passengers and merchandize and countenanced by the Interstate Commerce Commission, as therein noted. It has been held by the highest authority in the land, under a provision found in the interstate-commerce act, that when connecting car-

186 riers voluntarily enter into joint traffic arrangements the joint rate must be reasonable and may be made so. Cinn. R'y Co. *v.* Com'n, 162 U. S., 184. But independently of a previously existing joint arrangement we see no reason why under the amendatory act, G. L. 1895, chap. 91, the commission cannot lawfully compel a joint arrangement in a case like this. The evidence shows that the location of the Duluth road and the Minneapolis & St. Louis road, their track facilities, equipment, etc., are such that by operating together under joint traffic agreements the cost of the service can be greatly lessened. The public has at least a right to share in the benefits of this condition. If it is judicious so to do and of public benefit to have joint traffic arrangements in any given case, why should not the public be permitted to compel that such arrangements be made?

"If the State is to have any voice, therefore, in the establishment of reasonable rates, it must have a voice in some degree and some manner in the business of the carrier. Where a single carrier is being dealt with this can be accomplished by determining what the operating expenses ought reasonably to be, the reasonable value of the capital invested, what return under all the circumstances of

the case would be fair, and then by adjusting the rate an economical management is secured; but in a case like the one at bar where each may plead its inability to make the necessary agreement with the other the State must have the power to arbitrate between them and, within proper limitations, compel the acceptance of its award."

If the State is powerless to decide as between carriers we have, as said by counsel for the commission, the following absurdity, namely:

"A. The State may regulate rates.

B. The rate must be reasonable.

C. It must afford the carrier compensation over and above operating expenses.

D. The method of operating and consequent expenses is beyond the State control."

187 But this question has heretofore been considered and disposed of in this State adversely to defendant's contention in Jacobson *v.* R'y Co., 71 Minn., 519, now in the U. S. Supreme Court on a writ of error. It was there held that the act of 1895 did not under the facts of that case contravene the Federal or the State constitution when conferring upon the commission the power to compel the transfer and interchange of loaded cars and the making of joint rates for through shipments where the haul was in part on one and in part on the other of two connecting roads. There are no facts here which take this case out of the operation of the rule thus established, and we must abide by it as perfectly legitimate until the Federal court declares that an error has been committed.

We hold, therefore, that chapter 91, Laws 1895, violates no provision of the State or Federal Constitution, and under it the railroad and warehouse commission of this State has the power to compel the enforcement of joint through rates between points within this State by the connecting carriers now before us.

4. As to the second and most perplexing of these questions. By G. S. 1894, sec. 381, subd. C; *id.*, sec. 392, subd. A, and L. 1895, ch. 91, sec. 3, subd. C, it is enacted and provided that the tariff of rates, fares, charges, or classifications made by the commission shall be deemed and taken in all courts of this State as *prima facie* evidence that such tariff is equal and reasonable, the burden being on the railway company to show that the rates as fixed are unequal or unreasonable. This burden was on the defendant carrier when it resisted the enforcement of the order in the court below and continued at every stage of the trial, and in respect to all matters affecting its earning capacity, its fixed charges, its operating expenses, its sources of revenue, and the value of the property itself, and the question is, Was the *prima facie* character of the order of the commission swept away and overcome by the evidence, and was it shown by such

188 evidence that the rates established were so unjust and unreasonable as to be confiscatory in their nature, so that when the order was enforced it operated to destroy defendant's rights of property? Of course, this could be done by fixing a fair and reasonable joint rate for the two companies interested for the transportation of coal to points on defendant's road south of Minneapolis and then awarding too large a proportion or percentage of the joint

earnings to the Duluth and Minneapolis carrier, and this is what is complained of, for the commission gave to the carrier last mentioned $1.00 per ton, exactly what it had received under the voluntary traffic arrangement. The order or tariff of rates made and fixed by the commission being *prima facie* evidence that such rates are equal and reasonable, there is nothing in the claim made by counsel that it was the duty of the court below to make a specific finding as to the cost of transacting the business involved in this litigation, and if it had been the proper practice, where findings are not sufficiently specific, is to request that they be made so. Cummings *v.* Rogers, 36 Minn., 317.

That the commission had made the order complained of stood admitted in the defendant's answer herein, and it therefore became necessary for defendant to introduce competent and sufficient evidence at the trial to meet and overcome the *prima facie* case made by the relator. This counsel attempted to do by calling as witnesses several persons engaged in railroading, among them Mr. Nay, who was defendant's auditor. We shall not encumber this opinion with tables of figures as presented by this witness, but will simply say that appellant's capital stock outstanding June 30, 1899, the end of its fiscal year, was $10,000,000, while its bonded indebtedness was $17,800,000, the bonds bearing interest ranging from 4 to 7 per cent. per annum, the total interest per year aggregating $659,540. The total cost of the road
189 up to the date last given was $23,390,560.15, including all equipment. The gross earnings, interest from investments, interest and exchange, from trackage and other rentals for the year—that is, the total receipts—were $2,696,601.31. The total expenditures for the year were $2,237,939.27; the net income being $458,662.04. The witness testified that if the whole of this sum had been devoted to the payment of dividends upon capital stock it would be about 4½ per cent., and he also testified that it would not be practicable, in his opinion, to apply every dollar of the net income to the payment of stock dividends. We presume this to be true, but why it is so and to what use a part of the net income would necessarily be diverted from stock dividends, the witness omitted to state. He was then examined as to the earnings of the various operating divisions on the road, testifying to an actual deficit when compared with operating expenses. He was asked the average cost of operation per ton per mile in the Western division, including all kinds of merchandize, and fixed it at 1.293 cents, a little over one and a quarter cents, while the revenue returned under the rate fixed by the order would be but .779 of a cent, the net loss being a little over one-half cent per ton per mile. He then took up another division, and on this, according to the figures, the loss in hauling coal in carload lots would be about two cents per mile per ton. The cost of operating other divisions per mile was also shown, and on one was but .704 of a cent per ton per mile; and the average cost per ton per mile for carrying freight on the entire system was given by this witness as 1.112 cents for the year ending June 30, 1899. This included all business, through and local, the latter being esti-

mated at one-fourth of all, while the revenue derived for carrying coal at the rate fixed by the commission and to the stations named in the order would be 1.118 cents. This would be but .006 of a cent per ton per mile more than the average
190 cost for all classes of freight on the entire system. Upon the face of these figures and accepting them as correct for the purpose of deciding this case, it would seem that the rates fixed could not be sustained; but when we scrutinize the testimony of this witness and other persons upon which defendant relies we discover that the court below was right when it held that the *prima facie* character of the order had not been overturned by the proofs, for Mr. Nay's estimate as to the expense per mile is clearly wrong. He includes in his estimate of expenses for operation the dividends which were declared upon stock and interest paid upon bonds. He was asked upon cross-examination how he got at the amount of 1.112 cents as the average cost for carrying freight on the entire system and answered: "I arrived at that by taking the total operating expenses—taxes, *interest on bonded debt, dividends on stock*, amounts paid for trackage and other rentals, aggregating $2,532,522.60—and deducted therefrom receipts from interest and exchange, interest on investments, and trackage and other rentals received, amounting to $196,596.95, leaving a total net cost of $2,335,925.65. I found that the freight earnings were 74.41 per cent. of the gross earnings, and I took 74.41 per cent. of the net cost, which made $1,738,162.28 as chargeable to freight, and by dividing that by the total tons one mile gives 1.112 cents."

And when questioned as to his methods when ascertaining the cost per mile of operating each of the divisions before mentioned, and concerning which we have given his figures, his answer was in every instance that he included as *operating expenses* dividends paid upon stock shares and interest paid, with one exception. Referring to one division, the Southwestern, the questions put to Mr. Nay and his answers were as follows:

"Q. So that is the estimate you have made, the South-
191 western division gets a credit of fifty per cent. more than the actual earnings on a mileage prorate?

A. Yes, sir.

Q. And you say you have charged it with no dividend?

A. No, sir.

Q. On the other divisions you have included the dividend?

A. Yes, sir.

Q. Now, on what stock has dividends been paid?

A. On the first preferred and second preferred.

Q. The first preferred stock has been retired, has it not?

A. It was retired June 1st.

Q. And you have not included it in your capitalizations?

A. No, sir.

Q. Your statement that there was $10,000,000 of stock outstanding does not include the first preferred?

A. Does not include the first preferred.

Q. What was the amount of the first preferred?

A. $2,500,000.
Q. What dividends were paid on the second preferred?
A. There has been $180,000 paid on the second preferred.
Q. What percentage?
A. That would be four and one-half per cent.
Q. Four and one-half?
A. Yes, sir; two per cent. the first dividend and two and a half the second."

It seems to us very clear that in estimating the *operating expenses* of a railroad stock dividends cannot be included. They are no part of the cost of *operation*. Nor should they be included under any of the authorities when ascertaining the reasonableness of a rate tariff. This is in no manner denying the defendant's right to earn sufficient to pay its operating expenses, interest upon its *bona fide* bonded indebtedness, and a proper dividend upon its lawfully issued stock shares or value of the investment. We must not be understood by this last remark as intimating that defendant's bonded indebtedness and stock shares as testified to are not *bona fide* and proper
192 in every respect, for that stands admitted by all parties hereto.

We think, taking Mr. Nay's figures only, that it very conclusively appears that if all local freight of every class and description was carried at the rates fixed by the commission for coal in car-load lots the earnings would be ample to meet the operating expenses, interest upon the bonded indebtedness (although upon a part thereof the rate is very high), and a fair rate of interest upon the investment. This is evident from the table prepared by the State expert, Mr. Yapp, from figures submitted by Mr. Nay. We need not specifically allude to these tables, but one shows the total number of tons of hard coal received from Duluth for year ending June 30th, 1899, M. & St. L. R. R. proportion of revenue an average rate per ton per mile; also loss of revenue had commissioners' rates been in effect. Had the new rates been in effect that year the loss of revenue to defendant, according to this table, in evidence and not disputed, would have amounted to less than $1,500. This is a very slight depreciation of revenue, when we discover that the total earnings on freight on the divisions affected by the order amounted to over $700,000 for that fiscal year. There is another suggestive thing appearing in one of these tables, also undisputed. The estimated cost per ton per mile for carrying freight on that part of defendant's road lying in this State and also for the whole line—figures furnished by defendant—appears for the years 1890 to 1893, inclusive. The most expensive year of the four (for Minnesota) was 1892. Cost per mile per ton, .695 of a cent—that is, less than $\frac{7}{10}$ of a cent. For the entire system the expensive year was 1891. Cost per mile per ton, .743 of a cent, less than $\frac{8}{10}$ of one cent. A suggestion that the rapid increase in cost of operation from 1893 to 1898 needed explanation is hardly necessary, but a part of the explanation was furnished when it appeared that these stock dividends were included in the item of operating expenses.

193 It appeared from these tables, prepared from figures furnished by defendant corporation and not contradicted by its

witnesses, that on one division the average cost per ton per mile was .907 of a cent, while on the entire system or line it was but .709 of a cent., a trifle more than $\frac{7}{10}$ of a cent—in other words, about four-tenths of a cent less than the commissioners' rate. It should be said, however, at this point, that Mr. Yapp in making these computations confined operating expenses to actual expenses, including money paid out for taxes and for rentals. He did not include interest on bonds or dividends on stock. Counsel for defendant claims something for testimony as to rates received by other roads for this class of service, and by comparison asserts that the tariff complained of is too low. This method of ascertaining the reasonableness of the tariff is valueless, because it may be that the other roads are exorbitant in their charges. That another road is receiving, say, $1.00 per ton for carrying coal one hundred miles, while defendant receives but seventy-five cents for the same distance, may prove that the other road charges too much and should be looked after by the commission, but this kind of evidence does not demonstrate that defendant is receiving too little, and that the commission has fixed an unfair and unreasonable tariff of rates on its line. Another matter may well be referred to, and that is the so-called "commercial necessity," before referred to, namely, the application of principles in fixing rates which are forced upon carriers by various conditions and situations, and, as said in the Steenerson case, appear at first glance to amount to discrimination between towns and commodities. As was there stated, this rule is an every-day practice with carriers, and that it is well known and justified in business circles and is tolerated and approved because of the necessity cannot be overlooked by the courts any more than it is by legislatures or by commissioners or by the carriers themselves when making schedules of rates for the
194 transportation of either passengers or merchandize, and if this business policy actuates and influences the carriers themselves to disregard a rule of strict comparison and strict equality as between bulk or weight or value of the various commodities, and to carry one article many more miles for the same money that they do another, although there may be no substantial difference in bulk or weight or otherwise between these two articles, and this is approved by the public as good business policy under the circumstances, there is no reason why the legislature or the commission should not be actuated, influenced, and governed by the same rule, and there is no reason why the courts should not heed and act upon it when called upon to consider and review an order of the character of the one at bar.

This rule has constantly been recognized and acted upon by railroads and has often been referred to and countenanced by the Interstate Commerce Commission when considering the question of long and short hauls. It is this rule which governs when considering the long haul as against the short and permits the higher rate per mile for the latter, and it also allows a greater rate to be charged upon certain classes of freight than upon other classes where there is no material difference in weight, bulk, value, or cost of transportation, and is justified by the same argument.

At this trial it appeared from the evidence, and it is a matter of common knowledge, that articles for carriage as freight are classified somewhat arbitrarily by railroad companies and a different rate fixed for the transportation of each class, coal being in a very low rate class. Some articles—wood, for instance—were voluntarily carried in car-load lots for less than coal would be, if the order was complied with, and, if Nay was right in his figures, at less than cost. It also appeared that defendant under the old tariff of rates discriminated between stations on its
195 lines—that is, its freight mileage was not an uniform rate per mile, the result being that for some stations a lower rate prevailed than for others, the haul being the same as to distance. In view of the fact that freight is classified, that different tariff rates are fixed for each class, and that coal is placed by carriers themselves in the lowest class—that is, in the class which is usually transported at the lowest rate—it was, in our opinion, insufficient for defendant to rest its legal duty to overcome the *prima facie* character of the order by simply attempting to show that if all classes of freight *was* carried at the rates fixed by the order the revenue of the defendant road would be insufficient to meet its obligations, and therefore that the rate was unreasonable and confiscatory. The fact is that all classes of freight are not to be carried at this rate unless defendant chooses to do so. It would seem to follow that defendant did not go far enough in its evidence on this point. Again, recognizing fully the commercial necessity before mentioned, evidence should have been introduced on which a finding could have been based to the effect that there was no class of traffic on defendant's road upon which rates could be made or actually had been made and were being collected which would or had made good the loss of revenue resulting from the order. Nothing of this sort was attempted. One other suggestion in respect to defendant's failure of proof in rebuttal of the order: The rule laid down in the Steenerson case for ascertaining and determining whether the rates fixed are reasonable and not confiscatory was wholly ignored.

Defendant's counsel did show what the road had cost up to June 1, 1899. This included every item of expenditure from the start. Cost of construction, repairs, equipment, additions, and all other items were included; but not a particle of proof was presented as to present value or cost of reproduction. Nor did counsel pay any attention to what has been said by the court of last resort on this particular
196 subject. We quote: "But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders." Smyth *v.* Ames, 169 U. S., 466.

This is but a reiteration of what had theretofore been said in Dowe *v.* Beidelman, 125 U. S., 680. Nor do we understand that in the very recent opinion of the same learned court as announced in January last—Chi. R'y Co. *v.* Board, 20 Sup. Court Rep., 336—there has been

any departure or intimation thereof from what had been said in the earlier cases. It was there remarked that the State "court proceeded upon the theory that a comparison of the actual gross receipts of the company from its South Dakota local business with those which it would have received if the rates prescribed by the defendants had been in force was sufficient to determine the questions of the reasonableness of these latter rates, and instituted such comparison with respect to the four years preceding the commencement of this suit. Now, it is obvious that the amount of gross receipts from any business does not of itself determine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the business is profitable. The gross receipts may be large, but if the expenses are larger surely the business is not profitable. It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its receipts." It would seem self-evident that if the gross receipts of a business are less than
197 are the expenses of conducting that business there is a loss to the party carrying it on, and so the decision was clearly right, but in no manner does it affect the case before us.

Referring again to the rule laid down in the Steenerson case and that established in the Smith case, it is to be observed that the latter is more liberal, and if adopted by us for the purposes of this case defendant should not complain. It is evident that there was a lack of proof as to the present as compared with the original cost of construction unless, as urged by counsel, we assume that either the amount of stock and bonds outstanding or the construction account represent it. We decline to act on this assumption, and we do not regard the authority cited—Ames *v.* R'y Co., 64 Fed. Rep., 177—as so holding.

Judgment affirmed.

COLLINS, *J.*

198 STATE OF MINNESOTA, } *Supreme Court,* } *ss.*:

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the opinion and syllabus in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and seal of said supreme court, at the capitol, in the city of St. Paul, this 14th day of June, A. D. 1900.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE, *Clerk.*

199 [Endorsed:] No. 12111. State of Minnesota, supreme court. State *ex rel.* R. R. and Warehouse Com., resp't, *vs.* M'p'l's and

St. Louis R. R. Co., appellant. Copy opinion and syllabus. Original filed June 13, 1900. D. F. Reese, clerk. April term, A. D. 1900. Collins, J.

200 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

STATE OF MINNESOTA *ex Rel.* RAILROAD AND WAREHOUSE COMMISSION, Respondent,
vs.
THE MINNEAPOLIS AND ST. LOUIS R. R. CO. ET AL., Defts; Minneapolis and St. Louis R. R. Co., Appellant. } No. 207.

Pursuant to an order of court duly made and entered in this cause on the 29th day of June, A. D. 1900—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said Minneapolis and St. Louis Railroad Company, appellant herein, the sum and amount of seventy-four and $\frac{65}{100}$ dollars ($74.65), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 29th day of June, A. D. 1900.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	39.65
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$74.65

201 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this twenty-ninth day of June, A. D. 1900.

D. F. REESE, *Clerk.*

[Endorsed:] 12111. State of Minnesota, supreme court. Transcript of judgment. Filed June 29, A. D. 1900. D. F. Reese, clerk.

202 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

STATE OF MINNESOTA *ex Rel.* R. R. AND Warehouse Commission, Respondent, *vs.* THE MINNEAPOLIS AND ST. LOUIS R. R. Co. *et al.*, Def'ts; Minneapolis and St. Louis R. R. Co., Appellant.	No. 207. Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1900, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered June 29, A. D. 1900.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk,*
By J. L. HELM, *Deputy.*

203 [Endorsed:] No. 12111. State of Minnesota, supreme court. Copy of order for judgment. Filed June 29, A. D. 1900. D. F. Reese, clerk.

204 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1900.

TUESDAY MORNING, 9.30 O'CLOCK, *June* 13, 1900, *A. D.*

Court convened pursuant to adjournment, all the justices being present.

STATE *ex Rel.* RAILROAD AND WAREHOUSE Commission, Respondent,
vs.
THE MINNEAPOLIS AND ST. LOUIS Railroad Company *et al.*, Def'ts; Minneapolis & St. Louis R. R. Company, Appellant.
} Cal. No., 207; Reg. No., 12111.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

205 [Endorsed:] 12111. State of Minnesota, supreme court. Copy of minutes of argument. Filed June 29, A. D. 1900. D. F. Reese, clerk.

206 [Endorsed:] No. 12111. State of Minnesota, supreme court. State of Minnesota *ex rel.* Railroad and Warehouse Commission, respondent, against Minneapolis and St. Louis R. R. Co., appellant. Judgment-roll. Filed June 29, 1900. D. F. Reese, clerk.

207 STATE OF MINNESOTA, } *ss.*:
Supreme Court, }

I, D. F. Reese, clerk of the supreme court of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record in said court in the case of State of Minnesota *ex rel.* Railroad and Warehouse Commission, plaintiff and respondent, and The Minneapolis and St. Louis Railroad Company, appellant, and The St. Paul and Duluth Railroad Company, defendant, in said supreme court, including the pleadings, exhibits, stipulations of fact, findings of fact and conclusions of law, judgment, judgment-roll, opinion of said supreme court in said cause, assignment of errors made and filed in said cause by the defendants and appellant, and all papers filed and proceedings had in said cause in said court.

I do further certify and return that I have annexed to said transcript and included therewith the original writ of error from the Supreme Court of the United States; the original citation issued therein, with proof of service thereon; also the original petition for the allowance of said writ of error, together with the assignment of errors and a copy of the bond on said writ of error, and that the foregoing constitutes a full, true, and complete return to said writ of error.

I do further certify that section 3 of rule 9 of the supreme court of Minnesota is and has been at all time- while said case was in said court as follows:

"Prefixed to the brief of the appellant, but stated separately, shall be the assignment of errors intended to be urged. Each specification of error shall be separately, distinctly, and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the evidence, it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject-matter shall be considered unless stated in the assignment of errors."

The assignment of errors incorporated in the foregoing record entitled "Assignment of errors made and filed by defendant
208 and appellant in State supreme court" was duly made and filed in said State supreme court on the 3d day of April, 1900, prefixed to the brief of appellant, and stated separately in accordance with the rules of practice of said court in all things, and *were* a part of the record in said court upon which said cause was heard and determined.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota, at the capital, St. Paul, Minnesota, this 19th day of July, A. D. 1900.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk Supreme Court of Minnesota,
By J. L. HELM, *Deputy.*

[Endorsed:] State of Minnesota, supreme court. Return to U. S. Supreme Court. The M'p'l's & St. Louis R. R. Co., plaintiff in error, *vs.* State of Minnesota *ex rel.* R. R. and Warehouse Commission, defendant in error.

Endorsed on cover: File No., 17,866. Minnesota supreme court. Term No., 381. The Minneapolis & St. Louis Railroad Company, plaintiff in error, *vs.* The State of Minnesota *ex rel.* The Railroad and Warehouse Commission. Filed August 9, 1900.

Supreme Court of the United States

October Term,

No. [illegible]

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, EX REL. THE RAILROAD AND WAREHOUSE COMMISSION, DEFENDANT IN ERROR.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

ALBERT E. CLARKE,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

No. 381.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, EX REL. THE RAILROAD AND WAREHOUSE COMMISSION, DEFENDANT IN ERROR.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

THE CASE.

The St. Paul & Duluth Railroad Company is, and was at all the times referred to in the record of this case, a railroad corporation of the State of Minnesota, owning and operating a line of railroad from Duluth, on Lake Superior, to the cities of St. Paul and Minneapolis. Its local rate upon hard coal in car loads, from Duluth to St. Paul and Minneapolis, was one dollar and twenty-five cents per ton; the justness and reasonableness of which local rate is unquestioned, and is conceded. The Minneapolis & St. Louis Railroad Company is a railroad corporation of said State; and at the time the order of the relator in this proceeding was made, owned and operated a line of railroad extending from Minneapolis

southerly, through Hopkins to Albert Lea, in said State; thence, still southerly, to Angus, in Boone County, in the State of Iowa. At Albert Lea and Angus, it connected with other railroads, and by virtue of traffic arrangements, had and has, access to all the principal markets. It also owned and operated a branch line, extending from a connection with its main line at Hopkins (a station upon its main line nine miles south of Minneapolis), westerly ninety-two miles to Morton, Minnesota; at which last named point it connected with a railroad owned and operated by the Wisconsin, Minnesota Railroad Company, which extended westerly from Morton to Watertown, in the State of South Dakota. Winthrop is a station upon the line of The Minneapolis & St. Louis Railroad, between Hopkins and Morton, sixty miles west of Hopkins.

At the time order involved in this proceeding was made by the relator, the Railroad and Warehouse Commission, the Minneapolis, New Ulm & Southwestern Railroad Company, a railroad corporation of said State, had constructed and owned a line of railroad extending south from Winthrop to New Ulm, in Brown County, in said State. The capital stock of the last named company was owned by the Minneapolis & St. Louis Railroad Company; but it was nevertheless a separate and independent corporation; and it is so stated in the petition for the alternative writ of mandamus, and in the writ itself. (*Page 12, Record.*) As there are some errors in the petition for the alternative writ, as to the location of stations, I append to this brief a small plat illustrative of the situation.

At, and prior to, the commencement of this proceeding, the St. Paul & Duluth Railroad Company, The Minneapolis & St. Louis Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company had voluntarily made and put into effect a joint tariff for the transportation of hard coal, in car loads, from the lake port of Duluth, to stations on the line of The Minneapolis & St. Louis, The Minneapolis, New Ulm & Southwestern, and The Wisconsin, Minnesota & Pacific Railroads. The rates under this joint tariff from Duluth, to the stations involved in this proceed-

ing, are correctly shown in Schedule "A," page 26 of the printed Record, and at page 13 of this brief.

In dividing earnings under this joint tariff, there was first set apart to the St. Paul & Duluth Railroad Company *one dollar* per ton, for transporting the hard coal from Duluth to Minneapolis; the remainder being turned over to the one, or more, of the other three companies participating in the carriage of the coal to destination.

On September 22d, 1898, the Railroad and Warehouse Commission of Minnesota, having resolved to investigate the reasonableness of the joint rate referred to, made an order requiring all the railroad companies above named, to answer, as to the reasonableness of such rate, by a time fixed in the order.

The several carriers appeared, and answered that the tariff in force was just and reasonable (Page 13, Par. 5, and page 34, printed Record). On the 19th day of January, 1899, the Railroad and Warehouse Commission made an order whereby it decided and determined that the joint rate, then in force, for transporting hard coal from Duluth to the stations named in Schedule "A," was unreasonable and unjust; and that a reasonable and just rate for such service was the rate set forth in Schedule "B," found at pages 19 and 26 of the printed Record, and at page 13 of this brief, and ordered a reduction accordingly. (Page 26, Record.) The order of the Commission was duly served and promulgated, but was disregarded by the railroads interested.

On March 3d, 1899, the joint tariff which had previously been entered into by the carriers, for the transportation of hard coal between Duluth and the points named in Schedules "A" and "B," was cancelled; and since that date there has been no joint tariff between said points. (*Record, page 108.*)

Subsequently, on April 8, 1899, the Railroad and Warehouse Commission made and entered the order found on pages 20 and 21 of the printed Record, wherein it was recited that the St. Paul & Duluth, The Minneapolis & St. Louis and The Minneapolis, New Ulm & Southwestern Railroad Companies, had failed to agree upon a division of the joint rate fixed by the order of the Commission, as shown by

Schedule "B;" and thereupon the Commission, by said order, proceeded to, and did, determine and order that earnings under said joint rate, so fixed by it, should be divided by paying to the St. Paul & Duluth Railroad Company *one dollar* per ton for transporting hard coal from Duluth to Minneapolis; the remainder to be paid to The Minneapolis & St. Louis Company, which was left to settle with The Minneapolis, New Ulm & Southwestern and The Wisconsin, Minnesota & Pacific companies; for services rendered by those companies in the transportation of coal to points upon their respective railroads. Neither of the two last named carriers are parties to this proceeding; and no attempt is made to reduce their regular local rates, for transportation, over their respective railroads.

It should be noted here, that the amount allowed to the St. Paul & Duluth Company, was the same allowed that company, in a division of the voluntary joint rate made by the carriers themselves,—one dollar per ton; *and the whole amount of the reduction, made by the Commission, was assessed against The Minneapolis & St. Louis Railroad Company.*

The Minneapolis & St. Louis Railroad Company refused to accept the divisions made by the order of the Commission (which was duly promulgated), and refused to accept the joint tariff fixed by said order; and thereupon this proceeding was instituted in the name of the State of Minnesota, on relation of the said Railroad and Warehouse Commission. The case was tried in the District Court of Ramsey County on the issues presented by the Alternative Writ of Mandamus, and the Answer and Return made thereto by The Minneapolis & St. Louis Railroad Company, the appellant herein.

On February 15th, 1900, said District Court rendered judgment, that a peremptory writ of mandamus issue, as prayed; commanding the defendants to adopt the through joint rate fixed by the Commission, in Schedule "B," and dividing the moneys earned thereby, as directed by the order of the Commission made April 8, 1899; said order being Exhibit "C," on pages 20 and 21 of the printed Record. Said judgment is set out in full at pages 114 and 115 of the Record.

From the judgment so entered, The Minneapolis & St. Louis Railroad Company appealed to the Supreme Court of

Minnesota, by which court said judgment was, on June 29th, 1900, in all things affirmed. (Record, pages 132, 133.)

A Writ of Error was duly allowed by the Chief Justice of the Supreme Court of the State of Minnesota, upon the petition of The Minneapolis & St. Louis Railroad Company, and the case is now before this Court for hearing.

It is claimed by the plaintiff in error:

That the undisputed evidence shows, conclusively, that the tariff promulgated by the relator, and which the plaintiff in error is, by the judgment of the Supreme Court of Minnesota, required to accept and adopt, requires the plaintiff in error to render transportation service at less than the actual cost of such service; that such tariff is wholly inadequate and not compensatory; and, therefore, the act of the State in assuming to compel its adoption is violative of the Fourteenth Amendment, and also of Section Ten, Article One, of the Federal Constitution.

It is also claimed by the plaintiff in error, that the law, under and by virtue of which the State of Minnesota assumes to establish joint through rates or tariffs over the lines of independent connecting railroads, and by virtue of which it assumes to arbitrarily apportion and divide joint earnings, is violative of the Fourteenth Amendment to the Federal Constitution, and void.

The plaintiff in error claims the right to earn a reasonable profit upon its invested capital; and asserts that any profit which does not exceed the rate of interest which may be recovered, in the absence of a contract, is not *prima facie* excessive.

That the act of the State legislature, by which authority is conferred upon the Railroad and Warehouse Commission, to compel one carrier to use the cars of another carrier or to deliver its own cars to another carrier, is unconstitutional and void.

That the State has no power to compel a carrier to transport traffic originating at certain points, or upon the road of certain carriers designated by the State, at a less rate

than it may lawfully collect, *for the same service*, if the traffic originates elsewhere. In other words, the State cannot compel carriers to discriminate.

The questions involved are more precisely stated in the Assignment of Errors. There is no conflict in the *evidence*. The only conflict lies in the *conclusions*, stated by some of the witnesses.

ASSIGNMENT OF ERRORS.

The plaintiff in error respectfully submits that the Supreme Court of Minnesota erred in this:

1. In holding and deciding that the order of the Railroad and Warehouse Commission, by which it required this plaintiff in error to transport hard coal, in car loads, from Minneapolis to the several stations named in said order, for a compensation, and at a rate less than the cost and true value of the services rendered, is not violative of the Fourteenth Amendment to the Constitution of the United States; which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. In holding that the order of the Railroad and Warehouse Commission, by which this appellant is required to transport hard coal, in car loads, at a rate and price per ton fixed by said order, which rate or price is less than the actual cost and expense incurred by plaintiff in error in rendering said service, and is unjust, inadequate and not compensatory, is not violative of Section 10 of Article 1 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

3. In holding that the law enacted by the legislature of the State of Minnesota, embodied in Chapter 91 of the General Laws of 1895, by which the Railroad and Warehouse Commission of said State is authorized to compel two or more railroad companies to enter into a joint tariff; and make and adopt a joint rate, for the transportation of property over the lines of said companies; and which assumes to authorize said Commission to make a division of the joint earnings of two or more railroad companies, and to apportion such earnings, is not violative of the Fourteenth Amendment to the Constitution of the United States in this:

It denies to the plaintiff in error, the right to contract in reference to its own business; and thus takes its property without its consent.

It compels the plaintiff in error to enter into involuntary, unreasonable and unprofitable contracts with other carriers,

at the instance of third parties; resulting in a loss of business and revenue on the part of the plaintiff in error.

It requires the plaintiff in error to enter into involuntary contracts with other carriers.

It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed.

It requires the plaintiff in error to hire, and use, the cars and vehicles of other carriers in the transportation of traffic upon its own line.

It deprives the plaintiff in error of the right to make its own contracts with other carriers; and delegates to a non-judicial body the right to fix and determine the proportion of a joint through rate, which shall be paid to the plaintiff in error; thereby depriving the plaintiff in error of its property,—the right to use the same, and the right to contract in relation thereto.

It denies to the plaintiff in error the equal protection of the laws, which protect and insure to all citizens the right to contract in relation to their property; and deprives the plaintiff in error of its property without due process of law.

It abridges the privileges and immunites of the plaintiff in error as a citizen of the United States, by depriving it of the right to control, conduct and manage its own business.

4. In holding that the law of the State of Minnesota, by which it is held that in estimating, and computing, the cost of operating a railway per ton of freight, per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates, it is error to take into consideration any part of the earnings applied to the payment of dividends upon the capital stock of such railway, does not violate the Fourteenth Amendment of the Constitution of the United States in this:

The enforcement of such law deprives the company or corporation operating such railway of the right to earn or pay any dividend whatever on its capital stock; or to derive any income or return from the use and operation of its property; and enables the State, acting through the Railroad and Warehouse Commission, to make and enforce a tariff which will not permit the carrier to earn any sum in excess of actual cost of operation; and will compel such carrier to devote its property to the public use without compensation;

whereby it is deprived of its property without due process of law, and is denied the equal protection of the laws.

5. In holding that the State law, which, under the guise of a so-called "commercial necessity," assumes to compel railway carriers to transport freight over their lines of railway for a rate less than the actual cost of such service, does not violate the Fourteenth Amendment to the Federal Constitution, by depriving such carriers of their property without due process of law, and by denying the equal protection of the laws, which insure to all citizens the right to earn and receive a reasonable compensation for service rendered, and a reasonable profit over and above the actual reasonable cost of such service.

6. In holding that the law of the State of Minnesota, which authorizes all other citizens of said State to contract for, collect and receive a profit or dividend equal to six per cent. upon the capital invested, and denies to railway carriers the right to earn, collect and receive a dividend or interest charge not exceeding six per cent. upon its actual and necessary capitalization, does not violate the Fourteenth Amendment to the Constitution of the United States, by depriving such railway carriers of their property without due process of law, and by denying them the equal protection of the laws.

7. In holding that the State of Minnesota, acting through the Railroad and Warehouse Commission, has the right, power and authority to compel the plaintiff in error to enter into a joint rate, or make and perform an agreement with another carrier for the transportation of property over the lines of both companies.

8. In holding that the State of Minnesota has the right, power or authority to make and enforce a law, by which two or more connecting carriers may be compelled to transport shipments passing over two or more lines, for a less or different rate or tariff than the sum of the reasonable local rates or tariffs of the several carriers.

9. In holding that the State of Minnesota has the right, power or authority to make and enforce a law which declares and determines the manner and proportion in which money, earned by two or more carriers, in transporting mer-

chandise over two or more connecting lines, shall be divided between the several carriers.

10. In holding that the State of Minnesota has the right, power or authority to make and enforce a law, whereby a railroad carrier may be compelled to transport traffic originating upon the line of another railroad, designated by the Railroad and Warehouse Commission, at a different and less rate than it may lawfully collect and receive for the same service, where the traffic originates upon its own line; thereby forcing defendant to give a preference and discriminate in favor of certain traffic and certain localities.

11. In holding that the State of Minnesota has the right, power or authority to make and enforce a law whereby a railroad carrier may be compelled to charge and collect different rates, per ton, per mile, for traffic originating upon other railroads, from that collected for traffic local to its own railroad; notwithstanding the service rendered is identical.

12. In holding that the evidence does not show conclusively that the cost of the service required by the State, through the Railroad and Warehouse Commission, is not greater than the revenue to be derived from the proportion of the joint rate awarded to the plaintiff in error.

13. In holding that, in order to show that the rate fixed by the Railroad and Warehouse Commission is unreasonable, the plaintiff in error is bound to show the exact cost of transporting each particular commodity, and that such fact is not established by proof that the cost, per ton, per mile of transporting all merchandise is more than the rate per ton, per mile, fixed by the order of the Commission.

14. In holding that there was not competent and sufficient evidence of the capitalization, cost and value of the railroad of the plaintiff in error.

ARGUMENT.

I.

The first, and second, Assignments, allege error by the Supreme Court of Minnesota:

1. In holding, and deciding, that the order of the Railroad and Warehouse Commission, by which it required this plaintiff in error to transport hard coal in car loads, from Minneapolis, to the several stations named in said order, for a compensation, and at a rate less than the cost and true value of the services rendered, is not violative of the Fourteenth Amendment to the Constitution of the United States; which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. In holding that the order of the Railroad and Warehouse Commission, by which this appellant is required to transport hard coal, in car loads, at a rate, and price, per ton fixed by said order, which rate, or price, is less than the actual cost and expense incurred by plaintiff in error in rendering said service, and is unjust, inadequate, and not compensatory, is not violative of Section 10 of Article 1 of the Constitution of the United States; which declares that no State shall pass any law impairing the obligation of contracts.

The law is, seemingly, settled, that a carrier is entitled to charge and collect a tariff which will afford a reasonable compensation; the question as to what constitutes reasonable compensation, within this rule, is also fairly well settled. A law which assumes to establish and enforce a tariff which fails to afford and return such reasonable compensation violates the Federal Constitution.

Railway Company vs. Minnesota, 134 United States, 418, 459.

Reagan vs. Farmers Loan & Trust Co., 154 United States, 362, 399.

St. Louis & San Francisco Railway Company vs. Gill, 156 United States, 649.

Smythe vs. Ames, 169 United States, 466, 526.

Lake Shore & Michigan Southern Railway Company vs. Smith, 173 United States, 687.

Upon the question of fact, as to whether the rate established by the State Railroad and Warehouse Commission affords a reasonable compensation for the service rendered, there is no conflict of evidence. The undisputed evidence shows conclusively that the actual cost of transportation exceeds the revenue which would result from a compliance with the order of the commission.

The following table is a combination of Schedules "A" and "B," referred to, and incorporated in the alternative writ, with some additional information. The rates, per ton, fixed by the joint rate voluntarily entered into by the carriers, is shown in the column headed "Old Rate;" the rate fixed by the order of the Commission is shown in the column headed "New Rate." The third column shows the distance of each station from Minneapolis, in miles and tenths; and the last column gives the name of the railroad upon which the station is located. The Minneapolis & St. Louis is marked "St. L.," The Minneapolis, New Ulm & Southwestern "N. U.," and The Wisconsin, Minnesota & Pacific "Wis." The rate shown is, in each case, the rate, per ton, from Duluth to the station named:

Stations.	Old Rate.	New Rate.	Distance from Minneapolis.	R. R.
Hopkins	$1.75	$1.32	8.7 miles.	St. L.
Minnetonka	2.00	1.35	11.7 "	"
Deephaven	2.00	1.38	15.8 "	"
Excelsior	2.10	1.40	18.8 "	"
Waconia	2.35	1.51	31.5 "	"
Young America	2.45	1.56	39.1 "	"
Norwood	2.50	1.57	40.3 "	"
Hamburg	2.50	1.62	43.8 "	"
Green Isle	2.50	1.63	48.1 "	"
Arlington	2.50	1.68	54.3 "	"
Gaylord	2.50	1.75	62.3 "	"
Winthrop	2.50	1.80	69.3 "	"
Lafayette	2.50	1.86	76.1 "	N. U.
Klossner	2.50	1.91	82.1 "	"
New Ulm	2.50	1.95	88.0 "	"
Gibbon	2.50	1.87	77.4 "	St. L.
Fairfax	2.50	1.96	86.9 "	"
Franklin	2.50	2.01	94.9 "	"
Morton	2.50	2.05	100.4 "	Wis.
Redwood	2.50	2.11	106.8 "	"
Delhi	2.50	2.15	113.3 "	"
Belview	2.50	2.21	119.9 "	"
Echo	2.50	2.23	123.4 "	"
Wood Lake	2.50	2.29	129.7 "	"
Hanley Falls	2.50	2.33	134.8 "	"
Hazel Run	2.50	2.38	141.0 "	"
Clarkfield	2.50	2.42	146.2 "	"
Boyd	2.50	2.48	152.6 "	"

In taking up the discussion of the question as to whether or not the tariff fixed by the Commission is or is not compensatory, it is important to start in with a fair and definite understanding of two questions: *first*, what is meant by a "compensatory rate;" and, *second*, the method by which the reasonableness of a rate is to be determined. Fortunately, both of these important questions have been definitely settled by the decisions of the Federal Courts.

II.

A rate which is not productive of revenue sufficient to pay operating expenses, interest upon bonds and a reasonable dividend upon stock, is unreasonably low; and cannot be enforced.

It was at one time contended that the fixing of rates, for carriage, by a public carrier, was a matter wholly within the power of the legislative department of the State governments and beyond examination by the courts; and that in fixing such rates, neither the interest charges which railroad companies are obliged to pay upon outstanding bonds, nor the claim of the right of the stockholders to reasonable dividends were entitled to consideration. Two of the three contentions, were definitely adjudicated in favor of the carriers, in the case of *Reagan vs. Farmers Loan & Trust Company, 154 United States, 362.* This case was an important one; it being held therein, that a Railroad and Warehouse Commission is merely an administrative board created by the State, for carrying into effect the will of the State, as expressed by its legislation; that the equal protection of the laws guaranteed by the Fourteenth Amendment, forbids legislation, in any form, by which the property of one person is, without compensation, taken for the benefit of another, or of the public; that the action of the State, through its legislature and the Commission, fixing railroad rates, is the subject of judicial review; *and that in fixing such rates the payment of the "fixed charges," or interest upon the outstanding bonded indebtedness of the railroad, must be included as a part of the necessary expense of operating the railroad.*

The question of the right to earn dividends had not, at

that time, been directly presented to the Federal Courts; and MR. JUSTICE BREWER, in the opinion at page 393, says:

"Whether, in the absence of an express stipulation of that character, there is not implied in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, *is a question not yet determined.*"

This quotation from the opinion in the Reagan case, written in 1894, is important, by reason of the fact, that in 1888, the learned writer thereof, while circuit judge, wrote the opinion in *Railway vs. Dey, 35 Federal Reporter, 866,* from which opinion the following language is quoted:

"Compensation implies three things: Payment of cost of service, *interest on bonds, and then some dividends.* Cost of service implies skilled labor, the best appliances, keeping of the roadbed and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and the shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needed to obtain them. The same rule obtains as to engines, machinery, roadbed, etc., and it may be doubted whether even the legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much danger, from the full performance of this obligation to the public. *The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed any more than the property of the bondholders. Each has a fixed and a vested interest, which cannot be taken away.* I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, *neither can it destroy the stockholders' property because the railroad is mortgaged. It cannot interfere with a contract*

between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagor's rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholders' property may be reduced, in that less dividends are possible,—and that power of the legislature over property is conceded,—*yet, if the rates are so reduced that no dividends are possible,* and especially if they are such that the interest on the mortgage debt is not earned, *then the enforcement of the rate means either confiscation, or compelling, in the language of the Supreme Court, the corporation to carry persons or property without reward."*

This case is frequently referred to as supporting the claim that a rate is reasonable if it produces *any* revenue, much or little. It is true that the opinion has been so construed, but such construction was retracted in the Ames Case; and the same learned Judge says, in his opinion in the Reagan Case, written six years later, that the question is still undetermined. The question was subsequently met and decided by McKENNA, Circuit Judge, in the case of *Southern Pacific Company vs. Board of Railroad Commissioners, 78 Federal Reporter, 236,* a case decided November 30th, 1896. The holding was as follows:

"Rates are unreasonable which will not return a sum sufficient to pay operating expenses, interest upon bonds, and a *reasonable* dividend upon stock, where bonds and stock represent money invested in the property, and there has been no fraud or mismanagement in the construction or operation. A railroad company is entitled to a sum sufficient not only to pay its expenses, but to yield an *adequate* return on the investment."

In commenting upon the claim that a rate which returns *any* compensation to the stockholder is a reasonable rate (78 Fed. Rep., 261), the Court says:

"This is claimed to be established by authority. I do not think so. It seems to have been decided in the Dey Case, 35 Federal, 866. *But the same learned judge who ex-*

pressed that view in the Dey Case retracted it in the Ames Case, 64 Federal, 155, and it has received no judicial sanction since. This was inevitable when it came to be seen that the regulation of rates could not be an absolute legislative prerogative. When the power of judicial review was asserted and entertained, the Fourteenth Amendment of the Constitution was bound to be firmly and accurately applied. There could be no middle ground. Middle ground would satisfy neither legislative prerogative nor judicial prerogative. Certainly not the judicial prerogative. That must apply justice as it is understood by men, and, in its clear light, it was inevitable that it would come to be seen that the Fourteenth Amendment of the Constitution would be a composition of delusive words if it forbade only the taking of the physical property, while it permitted the taking of its value,—if its guaranties of the law's equal protection to all persons would be satisfied as to railroads by leaving them a microscopical profit. If so, the pool of Tantalus would lose its force to illustrate excited and disappointed expectations when compared with the organic law of this great land. We should keep in mind that the regulation of a railroad affects, in reality, the natural persons who own it, not the insensible, legal artificiality and abstraction called a corporation. For the natural persons the protection of the Constitution was intended, and would any one say that justice is done them, if their investment be allowed only an infinitesimal fraction of one per cent. while all other investments are expected to return, at least legal interest, with freedom, besides an unlimited advantage?"

I respectfully submit, that a reasonable rate for the transportation of goods by common carriers, is a rate which will permit the carrier to earn, and pay, its operating expenses, its fixed charges and a reasonable dividend upon its capital stock.

III.

The reasonableness of a schedule of rates for local business of a railroad company, is to be determined by a comparison between the gross receipts and the cost of doing the business. It must be determined without reference to interstate business, or profits derived therefrom.

The rule as above stated is the one announced by the

Supreme Court of the United States in *Chicago, Milwaukee & St. Paul Railway vs. Tompkins, 176 United States, 167.*

The opinion is written by MR. JUSTICE BREWER. The case holds that the question of reasonableness of the *local* rate must be determined by a comparison between the gross earnings from local business, and cost of transacting such local business; and failure to adopt that rule was held to be reversible error. It is also held, that it is proper to show that the cost of transacting local business is in excess of the cost of transacting through business; and that such testimony may not be disregarded simply because the exact difference in such expense cannot be mathematically demonstrated.

In *Smyth vs. Ames, 169 United States, 467, 541,* it is decided that the reasonableness or unreasonableness of rates, prescribed by a State, for the transportation of persons and property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. The court says, at pages 541-542, that the argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund, and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business.

In the case of *Ames vs. Union Pacific Railway Company, 64 Federal Reporter, 179,* MR. JUSTICE BREWER, at Circuit, says:

"There are certain matters which embarrass these cases, and render all computations more than ordinarily difficult. One is this: The various companies are doing an interstate as well as a local business. If these roads were wholly within the State and only local business done by them, the computation would be much simplified, and the effect of the reduction of the rates upon the property more easily disclosed. But all of these roads are interstate roads and a large portion of their business is interstate business. Some of it is local business in other States than Nebraska. Now, it will not do to look simply at the gross earnings, and, because the reduction therein made by the enforcement of this statute still

leaves enough to pay reasonable compensation to the owners of the property, uphold the act, because, if the legislature of Nebraska can put in force this tariff for local business, the legislatures of other States through which these roads run, and the Congress of the United States may make corresponding reductions on the rates on all other business, local and interstate, and the aggregate of such reductions might entirely destroy the earning capacity from the property.

Another matter to be noticed is this: There is in this act no interference with the passenger traffic, but only the maximum for freight rates. So we cannot place all the local expense over against all the local receipts and draw our conclusions therefrom. We have an attempt by the legislature to prescribe the maximum tariff for only the transportation of freight within the limits of Nebraska, and are called upon to determine whether the rates so fixed are unreasonable and afford no fair compensation to those who have invested their means in these railroad properties. In order to determine this we must ascertain what it cost to carry this local freight, what the receipts have been therefrom, and what reduction will be made in such receipts by the application of this act, and then we must take such proportion of the gross investments in the road as the present earnings from local freights bear to the total earnings of the road. From these computations we may see whether the reduction made by this act in the local freights, if applied to all the company's business, would leave any compensation to the owner, and if so, how much."

IV.

In determining whether a rate is reasonable, the value of the property employed must be considered.

In *Smyth vs. Ames, 169 United States, 546*, it is held that the basis of all calculation as to the reasonableness of rates, to be charged by a railroad company, must be the fair value of the property used by it for the convenience of the public. A railroad company is entitled to receive a fair return upon the value of that which it employs for the public convenience.

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under

particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case."

In the case at bar, the amount of stock and bonds of the appellant, was proven; also the cost of construction. No other evidence of the value of the property was offered by either party. One, or the other, of these should be accepted as the value of the property; that is to say, either the total capitalization (the sum of the stock and outstanding bonds), or the cost of construction, as shown by the construction account, represents the fair value of the property. This is the rule laid down in the case of *Ames vs. Union Pacific Railway Company* (*supra*), *64 Federal Reporter, 177, in which the Court says:*

"It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it; and computation as to the compensatory quality of rates may be based on such amounts. * * * Nevertheless, the amount of money that has gone into the railroad property, the actual investments as expressed, theoretically, at least, by the amount of the stock and bonds—is not to be ignored, even though such sum is far in excess of the present value."

It is made clear by reading the above decisions that the reasonableness of a schedule of rates for the local business of a railroad company must be determined by comparison between the gross receipts from *local business*, and the cost of doing such *local business*; that the question must be determined without reference to interstate business done or to profit derived from it; that under the rule that the rate, in order to be reasonable, must be sufficient to return a fair rate of interest or dividend upon the value of the property employed for the public convenience, the Court, in the absence of other evidence, should accept, either the cost of construction or the capitalization as evidenced by the stock and outstanding bonds, as the basis of value. With these points

fairly stated, and settled, we can now proceed to an intelligent consideration of the evidence in this case.

V.

The order of the Railroad and Warehouse Commission is not made applicable to all freight transported over all or any of the appellant's lines or divisions in the State of Minnesota, but is limited to the transportation of a *single commodity, between certain specified points.* It includes, only, hard coal in car loads shipped from Duluth to Minneapolis, via the St. Paul & Duluth Railroad, and delivered to the appellant at Minneapolis for transportation over its own line and that of the connecting carriers, to the several stations named in the order and listed in Schedule "B." It does not include passenger earnings. The rate per ton fixed by the Commission as compensation for the service rendered by the appellant and its connecting lines, is obtained by deducting one dollar from the through joint rate, as fixed by the order; the one dollar being the proportion of such rate awarded to the St. Paul & Duluth Company.

Mr. Frank Nay, the auditor of the Minneapolis & St. Louis Railroad Company, testified as to the capitalization, and cost of construction, earnings and expenses of the appellant company; his testimony being found at page 45 of the printed Record and succeeding pages.

The value of the entire property is as follows:

Bonded Debt.

Merriam Junction & Albert Lea; amount outstanding	$ 950,000
Iowa Extension; amount outstanding	1,015,000
Pacific Extension; amount outstanding	1,382,000
First Consolidated; amount outstanding	5,282,000
First & Refunding; amount outstanding	7,800,000
Minneapolis & Duluth	280,000
Minneapolis & Merriam Junction	455,000
Southwestern Extension	636,000
Total	$17,800,000
Capital Stock	$10,000,000
Total Capitalization	$27,800,000

Of this there had been actually expended in purchase and construction up to June 30, 1899, the end of that fiscal year, $23,390,560 (Record, page 46).

Under the rule laid down by the Supreme Court of the United States, in the *Ames Case, 64 Fed. Rep., 177,* it must be conceded that in the absence of other evidence, either the capitalization, or the construction account, should be assumed to be the fair value of the property, as a basis for determining whether the rate is compensatory; and we concede that the smaller sum, viz., the cost as shown by the construction account, should be adopted. This fixes the value of the property at $23,390,560.

The income and expenditures for the fiscal year were as follows *(Record, page 46):*

RECEIPTS.

Gross earnings of the whole system	$2,500,004,36
Interest from investments	25,952.41
Interest and exchange	18,936.19
Trackage and rentals	151,708.35
Total receipts from all sources	$2,696,601.31

EXPENDITURES.

Operating expenses	$1,438,004.84
Taxes	84,700.25
Interest on bonded debt	659,540.00
Trackage and other rentals	55,694.18
Total expenditures	$2,237,939.27
TOTAL RECEIPTS	$2,696,601.31
TOTAL EXPENDITURES	$2,237,939.27
NET EARNINGS	$458,662.04

It will be seen from the foregoing tables that *the whole net earnings* equal but four and one-half per cent. of the capital stock; which, in view of the fact that the legal rate of interest in Minnesota in absence of contract is six per cent., would not be an unreasonable dividend could the whole sum

be thus applied. This, of course, is wholly impracticable. From net earnings there must be paid so many items of expense, that only a part of the net earnings can be devoted to the payment of dividends. For instance, the deterioration of equipment, notwithstanding all repairs and renewals, is fixed by the Master Car Builders' Association at six per cent. per annum, and this item alone absorbs $120,000 of our net earnings. This statement is made as an illustration only, but the evidence shows that the expenditures show no provision for purchase or renewal of equipment, purchase of additional property, construction, improvements, betterments, or anything except actual present expenses.

The dividends actually paid amount to $294,583.33, *and were paid from the $458,662.04, net earnings*, that is to say, the $458,662.04 represents the net earnings; *before any dividends were paid*, and all dividends actually paid were paid from that sum.

The original stock capitalization of the appellant, at the reorganization in 1894, was as follows:

First Preferred stock	$2,500,000
Second Preferred stock	4,000,000
Common stock	6,000,000
Total	$12,500,000

The first preferred stock was retired June 1st, 1899, by payment of the principal and a dividend at 5 per cent., in accordance with the conditions of the certificates. It was paid by a bond issue at 4 per cent., *so that the interest has become a fixed charge, and must be paid. (Record, page 69.)*

The dividend paid for the fiscal year up to the time of the retirement of this stock was, for eleven months, at the rate of 5 per cent.	$114,583.33
Dividend on $4,000,000 second preferred, at 4½ per cent.	180,000.00
Total dividends	$294,583.33

No dividend has ever been paid on the common stock. *See page 69, printed Record.*

It will be noted that the actual dividends paid amount to less than three per cent. upon the capital stock; also that $114,583.33 of this sum paid was substantially converted into a fixed interest charge, and is but technically a dividend. The real dividend was but $180,000,—less than two per cent. on the capital stock.

This statement of the value of the property, *as a whole;* its gross earnings and expenses, *as an entirety;* and the dividend account, is of little immediate importance in the determination of the principal question in this case, as the reasonableness of local rates must be determined by a comparison of the earnings possible under the rate fixed by the commission, with the cost of doing the business; and must be determined without reference to the interstate business, or the profit derived from it. It will be seen, however, as the argument progresses, that the statement is, indirectly, of considerable importance in establishing the fact, that, in ascertaining the actual cost of transportation of the traffic involved in this proceeding, the estimates have been made upon the precise lines prescribed by the Federal Courts.

VI.

The undisputed evidence shows conclusively that the earnings which will result from the rate fixed by the Railroad and Warehouse Commission, will return or yield no adequate compensation for the service rendered; that the actual cost of transportation is in excess of such earnings; and that an enforcement of the tariff will subject the appellant to actual loss.

The correctness of this proposition will be demonstrated in more than one way. That it is unjust, discriminative and unfair; violative of all precedent, custom and methods in railway rate making and regulation, will be shown by comparison and illustration; and that it is noncompensatory, inadequate and confiscatory, will be shown by mathematical demonstration.

The local rate of the St. Paul & Duluth Railroad Company, one of the defendants in this proceeding, for transporting hard coal in car loads from Duluth to Minneapolis, was and is, as shown by the record, one dollar and twenty-five cents

per ton. The mileage adopted by the commission as a basis for fixing rates, is 156 miles. This rate and mileage is shown upon the map, made for that purpose by MR. YAPP, the Relator's statistician, and used in evidence in this case *(see map at page 116, printed Record);* also by the testimony of Hon. IRA L. MILLS, Chairman of the Commission. *(Record, page 76.)* The rate per ton, per mile, from Duluth to Minneapolis, is 8 mills—eight-tenths of one cent. This rate per ton, per mile, the local rate of the St. Paul & Duluth Company, from Duluth to Minneapolis, was adopted by the commission as the basis of the joint through rate, *and was extended* from Minneapolis to all the stations named in Schedules "A" and "B." That is to say, the commission fixed the compensation to be paid to the Minneapolis & St. Louis Company, The Wisconsin, Minnesota & Pacific Company and The Minneapolis, New Ulm & Southwestern Company, for transporting hard coal, in car loads, from Minneapolis to the various points named in those schedules, at *eight mills per ton per mile. See testimony of Ira L. Mills, pages 76-77, and testimony of W. M. Hopkins, page 77, printed Record.*

Now let us compare the conditions:

The St. Paul & Duluth Company transports very nearly *half a million tons,* annually, between Duluth and the Twin Cities; the rate to St. Paul and Minneapolis being the same. This is nearly fifteen hundred tons daily, Sundays included. This is the testimony of its General Freight Agent. See printed Record, page 43. As this is *through business* from Duluth to the Twin Cities, it means a continuous run of 156 miles; with solid trains; no stops for local work or switching. It means, in brief, the ideal method of handling traffic, in a continuous run, at a minimum cost.

The Minneapolis & St. Louis, The Wisconsin, Minnesota & Pacific and The Minneapolis, New Ulm & Southwestern companies handled, *during the same period,* between Minneapolis and the stations named in the order of the commission, the following shipments of hard coal:

Hard coal handled by the Minneapolis & St. Louis; The Wisconsin, Minnesota & Pacific, and the Minneapolis, New Ulm & Southwestern companies, between Minneapolis and the stations named in Schedules "A" and "B," during the fiscal year:

Stations.	Tons.	R. R.	Distance from Minneapolis.
Hopkins . . . . . none	.....	.....	.....
Minnetonka . . . . . none	.....	.....	.....
Deephaven . . . . . none	.....	.....	.....
Excelsior . . . . . none	.....	.....	.....
Waconia . . . . . none	.....	.....	.....
Young America . . . . none	.....	.....	.....
Norwood	34	St. L.	40
Hamburg . . . . . none	.....	.....	.....
Green Isle . . . . . none	.....	.....	.....
Arlington	74½	St. L.	54
Gaylord.	30	"	62
Winthrop	143	"	69
Lafayette	39	N. U.	76
Klossner . . . . . none	.....	.....	.....
New Ulm	526½	N. U.	88
Gibbon	115	St. L.	77
Fairfax	340	"	87
Franklin	160	"	95
Morton	270	"	100
Redwood	143	Wis.	107
Delhi . . . . . none	.....	.....	.....
Belview	44½	Wis.	120
Echo.	195	"	123
Wood Lake.	42½	"	130
Hanley Falls . . . . . none	.....	.....	.....
Hazel Run	75	Wis.	141
Clarkfield.	169	"	146
Boyd.	12	"	153
Total	2413		1668

Average distance.....98 miles.

See testimony of General Freight Agent, W. M. Hopkins, page 70, of the printed Record.

Here we have a total of but *two thousand four hundred and thirteen tons;* distributed to *seventeen stations,* at an average distance from Minneapolis of 98 miles; these seventeen stations, situated on three different railroads; each car being taken from one train, and put into another, three—possibly four times. (See printed Record, pages 71-72.)

A reasonable switching charge for each car, at each point of transfer, is two dollars per car; which gives no profit and barely covers the cost of the work (Record, page 72). This is uncontradicted.

It is manifestly unfair to extend the local rate of the St. Paul & Duluth Company, for hauling a half million tons of hard coal, annually, in solid trains, doing no local work and making no transfers; starting at Duluth and stopping at the Twin Cities after a continuous run of 156 miles,—to the small traffic divided among three railroad companies, destined to seventeen stations, transferred at three junctional points, at an average distance of ninety-eight miles from Minneapolis.

VI.

The rate per ton, per mile, fixed by the order of the commission is unjust and discriminative, as compared with the reasonable rates charged, and collected, by other carriers for the same service.

The following table, made up from the uncontradicted testimony of General Freight Agent, W. M. Hopkins, shows some hard coal tariffs on other Minnesota lines; all shipments originating at Duluth (Record, pages 77, 78, 79):

Station.	Miles from Duluth.	Rate per ton.	Rate per ton per mile.
Fergus Falls.....	217	$2.45	1.129 cts.
Breckenridge.....	242	2.75	1.136 "
Appleton.....	250	2.50	1. "
Cottonwood.....	248	2.50	1.008 "
Morris.....	227	2.40	1.057 "

The through rate, from Duluth to New Ulm, under the tariff in force prior to the making of the order of the commission, was $2.50 per ton; the distance being in round numbers, 250 miles; in exact figures, 244 miles. This $2.50 rate was, of necessity, extended as far west as Madison, a distance of 331 miles from Duluth, in order to meet the rate made by the Great Northern Railway, from Duluth to Appleton, a station opposite Madison; the Great Northern having the short line. (Record, page 78.)

The rate from Duluth to Brownton, Stewart and points on the Chicago, Milwaukee & St. Paul Railroad, opposite Winthrop and Gibbon, on the line of the plaintiff in error, is $2.50 per ton. The rate to Bird Island and points on the "Milwaukee,' opposite Morton, is $2.50 per ton; to Renville and points opposite Delhi or Echo, $2.50 per ton; to Montevideo, opposite Clarkfield, $2.50 per ton.

The average reduction made by the order of the commission is 53 cents per ton. (*See testimony of W. M. Hopkins, Record, page 78.*)

The commission fixed the proportion of the joint rate established by its order, to be paid to The St. Paul & Duluth Company, at $1.00 per ton; the same company voluntarily accepts *85 cents* per ton for hard coal destined to points on the line of the plaintiff in error, south of Albert Lea (Record, page 84); and *ninety cents* per ton for coal destined to Waseca (Record, page 84), *the service rendered by the "Duluth" Company being in each case identical*, viz.: transportation from Duluth to Minneapolis. These facts are testified to and explained fully by General Freight Agent, Mr. W. M. Hopkins, and are not controverted. The effect of the order of the commission is to reduce the tariff on appellant's road, on an average of 53 cents per ton below the rates of other carriers for the same service; and this, upon business for which the original charge did not exceed $1.50 per ton.

It is not necessary, however, to rest our case upon comparisons. The *actual cost* of rendering the service required in the transportation is greater than the revenue yielded by the tariff fixed by the commission. The computations showing

the cost of transportation were made by MR. FRANK NAY, plaintiff in error's Auditor, who, in making them, adopted the rule prescribed by MR. JUSTICE BREWER, in the *Ames Case, 64 Fed. Rep., 179*, quoted at page 18 of this brief.

MR. THOMAS YAPP, the statistician for the commission, accepted the figures; says they are correct; *adopted them*, and was only enabled to reach a different result *by arbitrarily deducting from our statement of expenditures, the amount paid as interest on bonds, and the comparatively small amount paid as dividends*, both of which items should be considered and included in the statement of expenditures.

All shipments of hard coal from Duluth to points designated in the order of the commission, are delivered to the appellant at Minneapolis. They, first, go to Hopkins; which, although nominally a station, and included in the tariffs, is in fact within the Minneapolis terminals; all shipments thereto being handled on a "switching charge." The "Western Division" extends from Hopkins westerly to Morton. (Record, page 50.) The "Pacific Division" extends from Morton to Watertown, South Dakota; and was, at all the times referred to in this proceeding, owned and operated by the Wisconsin, Minnesota & Pacific Railroad Company (Record, page 51); and the Minneapolis, New Ulm & Southwestern Division, extended from Winthrop to New Ulm (Record, page 52). All the hard coal traffic in controversy passed over these three divisions: from Hopkins west.

It is undisputed, that the cost per ton, per mile, of handling traffic over these three divisions is correctly estimated by Mr. Nay. No criticism of his method is made. It is the same method adopted by the plaintiff. It is the method prescribed by Judge Brewer as stated above. Now let us look at the results:

WESTERN DIVISION.

(Minneapolis & St. Louis.)

The average cost of operation, per ton, per mile, during the fiscal year, upon the Western Division (Hopkins to Morton), was 1.293 cents; the rate per ton per mile fixed by the commission is .779 cents; *the net loss per ton per mile is .514 cents—more than half a cent. Record, page 50.*

Minneapolis, New Ulm & Southwestern Division.
(M., N. U. & S. W. Railroad.)

The average cost of operation per ton, per mile, during the fiscal year upon this division (Winthrop to New Ulm) was 3.962 cents. On account of the short haul and high cost of operation, the New Ulm Company was allowed, arbitrarily, 30 per cent. of the revenue from traffic passing over its line (Record, page 48). This allowance would increase its revenue to 2.103 cents per ton per mile, but the expense of operaton would still exceed the revenue, under the commission rates, to the amount of 1.859 cents per ton per mile. But for the "arbitrary" the loss per ton per mile would be *nearly three cents. See Record, pages 50 and 51.*

The railroad constituting this division did not earn operating expenses, under the old tariff, notwithstanding it received an "arbitrary" of 30 per cent., the net loss for the fiscal year being $8,000. (Record, pages 48, 49.) The length of the road was but 20 miles; and prior to March 1st, 1899, it was an independent corporation. (Record, page 47.)

The Pacific Division.
(Wis., Minn. & Pac. R. Co.)

What is *now* known as the Pacific Division of the appellant was, until February 20, 1899, an independent railroad property, owned and operated by the Wisconsin, Minnesota & Pacific Railroad Company. It extended from Morton, Minnesota, to Watertown, South Dakota. (Record, page 51.) Of the stations named in the order of the commission, nine are located upon this line of road, viz: Redwood, Delhi, Belview, Echo, Wood Lake, Hanley Falls, Hazel Run, Clarkfield and Boyd. The cost per ton per mile, for handling freight on the road, was 3.184 cents, or *1.966 cents more than the average rate fixed by the commission. See page 58, printed Record.*

The St. Paul Division.
(Minneapolis & St. Louis.)

This division consists of the leased line between St. Paul

and Minneapolis, includes expensive terminals, and the cost of operation is 5.840 cents per ton per mile (Record, page 58).

These divisions include all of the trackage over which these shipments pass; and the trackage over which any given shipment *may* pass, includes the whole of one or all of these divisions. In short, it is upon these divisions, exclusively, that the business covered by the order of the commission is transacted. In making the computations, each division has been credited with the share of the carriage on a mileage basis, except that the New Ulm and St. Paul Divisions have been credited, arbitrarily, with a percentage, which has been considered in making the computations. *See page 58, printed Record.*

It is made clear by the testimony that the *actual cost* of the contemplated service, is greatly in excess of the rate allowed by the commission.

The Auditor, also, made a computation of the cost, per ton per mile, of the transportation of freight on the entire system, including the main line, where the cost of operation is lowest (estimated per ton, per mile) and including, of course, interstate traffic, which cannot be considered in a decision of this question.

The average cost per ton per mile of carrying freight *on the entire system* is 1.112 per cent. (Record, page 66.) The average revenue per ton per mile afforded by the tariff fixed by the commission is 1.118 cents (Record, page 68).

The rate fixed by the commission consists, first, of a rate of 8 mills per ton per mile from Minneapolis to destination. This is obtained, as already shown, by extending the local St. Paul & Duluth rate of $1.25 per ton, between Duluth and Minneapolis, to the stations covered by the schedules. The division of the joint rate made by the commission gives the St. Paul & Duluth *one dollar per ton*, and the extra twenty-five cents per ton, included in its local rate, is added, as an arbitrary, to the rate fixed for the appellant, without regard to the mileage. In each case, the rate made for appellant is 8 mills, per ton, per mile, from Minneapolis, plus 25 cents. Mr. Nay, in his computations, has estimated actual earnings of each division, and actual expenses, giving each division credit for arbitraries received in apportioning earnings.

This raises the earnings of the New Ulm Division to 2.103 cents per ton per mile, a sum much in excess of its real earnings, *notwithstanding which, there still remains a net loss or deficit.* The *average* earnings per ton per mile, to all points named in the schedule, would be, under the rate made by the commission, 1.118 cents. This average rate is but .006 of a cent per ton per mile, more than the average cost of operation, on the whole system, including interstate business. The decision of this case must, however, rest upon the cost of doing the *local* business. Such is the rule laid down by the courts. Other divisions, and other traffic cannot be drawn upon in order to enable the State to compel the plaintiff in error to do work for less than cost. A law which requires it, violates the Fourteenth Amendment to the Federal Constitution in this:

While other persons are permitted to receive reasonable profits upon their invested capital, the plaintiff in error is deprived of that right; whereby it is denied the equal protection of the laws. Such an enactment or regulation is not due process of law.

Railway Company vs. Minnesota, 134 United States, 458;
Reagan vs. Farmers Loan & Trust Company, 154 United States, 399;
Smyth vs. Ames, 169 United States, 526;
Railway Company vs. Smith, 173 United States, 687.

It violates Section 10, Article I, of the Constitution of the United States, in this:

The plaintiff in error, by accepting its charter, entered into a contract with the State of Minnesota, by which it undertook to perform the duties and obligations of a railroad carrier, for the benefit of the public. In consideration of this undertaking, the State became bound to permit the carrier to charge, and receive, such reasonable rates for the service rendered, as to enable it to maintain and operate its railroad and return a reasonable compensation for the use of the capital invested in the enterprise. A law which prohibits such reasonable rate is a direct and specific violation of the contract.

VII.

AS TO THE METHOD AND CORRECTNESS OF THE COMPUTATIONS.

The rule laid down in the case of *Ames vs. Union Pacific Railway Company, 64 Fed. Rep., 179*, for determining whether the rate fixed by the commission is compensatory, as stated by MR. JUSTICE BREWER, is quoted on page 18 of this brief. A reference to the testimony of MR. NAY will satisfy the Court that this rule has been closely followed in making the computations in the case at bar; although they were made without knowledge of the decision. A full explanation of the method adopted will be found at pages 53 to 56; pages 60 and 61 and pages 65 to 67, of the printed Record. Its correctness and absolute fairness will be conceded. *It is conceded by the defendant in error.* The only witness offered by the plaintiff, as to the reasonableness of the rate, was the relator's statistician, MR. THOMAS YAPP, who introduced certain tables, or exhibits, showing the cost of operation to be less than as stated by Mr. Nay. This result was reached, however, by *adopting Mr. Nay's figures as correct*, and deducting therefrom the two items of "Interest on Bonds" and "Dividends." MR. YAPP so testifies, at page 106, of the printed Record, as follows:

"Q. In the net cost, have you included the interest paid upon the bonded indebtedness, or any dividends upon stock? A. No, sir.

Q. Those items have been omitted? Yes, sir.

Q. Now, have you accepted the items as given by Mr. Nay in his testimony at page *45 (Record, page 60), with the exception, that you have not included the items of interest and dividends? Was it your intention to accept them? *What I mean is, was that your idea, that you would accept the items, with the exception that you would omit interest and dividends?* A. Yes, sir.

Q. This is intended to be a statement made from the evidence of Mr. Nay? A. *Yes, sir, just eliminating those particular items.*

Q. Just eliminating those particular items and then estimating the cost on your basis? A. Yes, sir."

*This reference is to a page in a transcript used in the trial. The evidence referred to is found at page 60, of the Record.

MR. YAPP stated on the stand that the statement of operating expenses by "divisions" and the statement as a total, covering the whole line, did not agree; but this is explained by MR. NAY at pages 107 and 108 of the printed Record, and is wholly unimportant.

The State admits, therefore, that the computations made by Mr. Nay are correct; and it is consequently proved, beyond question, that the rate fixed by the commission is less than the actual cost of the service required. This must be conceded unless the State is correct in its contention, that the money paid for interest on bonds and dividends must be deducted. These questions are not open to discussion. The authorities hereinbefore cited, settle conclusively the propositions that fixed charges must be paid, that rates are not compensatory which do not permit the carrier to earn sufficient money to pay them, and that the tariff must also permit the company to earn enough to pay *reasonable, adequate* dividends.

The total dividends paid *on the entire railroad*, which extends into three States, amount, as stated, to $294,583.33,—less than three per cent. on the capital stock.

No dividend was included in computing the cost of operating The Minneapolis, New Ulm & Southwestern Division. It was operated at a loss, earned no dividends, and was charged with none. It was an independent corporation. *See testimony of* MR. NAY. *Record, page 63.*

The Pacific Division was only charged with the proportion of the annual dividend, which was represented by that part of the fiscal year during which it was owned by the plaintiff in error (five months), viz: $38,148.55. *Record, page 63.* And the preferred stock, representing $2,500,000, has been retired by bonds which draw interest at 4 per cent., a rate much in excess of the average dividend paid. This interest is now a fixed charge upon the property. This preferred stock is not included in the capitalization.

VIII.

To exclude all dividends from operating expenses would not bring the cost of operating within the revenue which could be earned under the rate made by the commission.

The computation is readily made from the figures in evidence, and gives the following result:

MINNEAPOLIS, NEW ULM & SOUTHWESTERN DIVISION.

Cost of transportation, per ton per mile . . .	3.962 cents.
Revenue (including 30 per cent. arbitrary) . .	2.103 cents.
Net loss, per ton per mile	1.859 cents.

WESTERN DIVISION.
(M. & St. L. R. Co.)

Cost of transportation, per ton per mile, excluding dividend	1.100 cents.
Revenue from commission's rate (Record, page 50)	.779 cents.
Net loss, per ton per mile	.321 cents.

PACIFIC DIVISION.
(W., M. & P. Ry. Co.)

Cost of transportation, per ton per mile, excluding dividends	2.873 cents.
Revenue from commission rate	.800 cents.
Net loss, per ton per mile	2,073 cents.

This computation is readily verified, and is a liberal one to the State, as credit has been given for all arbitraries allowed on the railway accounting between divisions.

It is clear that, although the law is settled that the tariff, to be reasonable, must afford a revenue sufficient to pay a *reasonable, adequate* dividend, the rate in this case would not enable any division, over which the traffic must be transported, to pay operating expenses, *excluding all dividends.*

IX.

In the memorandum filed by the District Court, this language will be found, at pages 111 and 112, of the printed Record:

"I am of the opinion that the defendants have wholly failed to prove that the rates fixed are unreasonable. While it may be the fact that the rates fixed are less than the cost of transportation as claimed by the defendants, the evidence does not show it. *It is perhaps proved that the cost of carrying all freight is greater than the revenue the Minneapolis & St. Louis Company would derive if the rate fixed by the commission for 'coal in car load lots' was to be applied to all freight.* But 'coal in car load lots' is a comparatively insignificant item in the total freight carried by the company, and it must be conceded that the cost of transporting coal in car load lots per ton per mile is considerably less than the average cost for all freight. *It is not only not shown by the testimony what the cost per ton per mile for carrying hard coal in car load lots is, but there is no testimony in the Record that enables me to make even a fair guess as to what it is, or as to whether it is less or greater than the rate per ton per mile allowed under the rates fixed by the commission.* In other words, proof of the cost per ton per mile of transporting all freight furnishes no data from which I am able to estimate the cost per ton per mile of transporting 'hard coal in car load lots.' This cost being unknown, it is impossible to say that the rates fixed by the commission will not yield the company a fair revenue."

Here is a finding that the plaintiff in error has established its case. It is stated that "the cost of *carrying all freight is greater than the revenue which the Minneapolis & St. Louis Company would derive if the rate fixed by the commission for coal in car load lots was to be applied.*" That should determine the case in appellant's favor. The law deals with possibilities, not with impossibilities. To determine the exact cost of transporting the few car loads of coal hauled over these divisions, is impracticable and impossible. There is no method by which it can be done. No accountant on earth can do it. If there are ten cars of silk in a train, and ten cars of hard coal, each car being of the same weight, the cost of hauling the coal would be exactly the same as the cost of hauling the silk. It takes just as much fuel, labor, power and time to transport a ton of coal as it takes to transport a ton of silk. The risk and responsibility are greater in one case, than in the other, but the *cost* is the same. Why it should be conceded that the cost of carrying hard coal is "considerably less than the average cost for all freight," does not appear.

It might, in fact, be much less, and still exceed the tariff fixed by the commission. Hard coal is not, however, in the lowest classification. Many commodities take a lower rate (Record, page 91). If the relator may single out one commodity, and demand that the plaintiff in error shall establish the exact cost of carrying that commodity, as distinguished from all others, and failing, submit to the proposed reduction in rates, the process may be continued and extended to each commodity, until the result will be confiscation. In discussing a kindred question, MR. JUSTICE BREWER says, in the South Dakota Rate Case, *167 United States, 177-8:*

"But here we are confronted by the ninth statement in the findings of fact, to-wit: 'that the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896 and 1897 was.' If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount of money paid out for doing such work, it is undoubtedly true; but there are many things that have to be determined by court and jury, in respect to which mathematical accuracy is not possible."

It must be conceded, that the cost of doing local business is greater than that of doing through business. The business of the appellant's railroad system, which is local to the State, is but 25 per cent. of its entire traffic (Record, page 59). The carriage of hard coal to the points named in the schedules is purely local business; and as the small amount transported, is distributed among seventeen stations, and as each car is taken out of one train and put into another train, *at least three times,* as explained by MR. HOPKINS *(Record, page 71), at an actual cost of six dollars per car (Record, page 72),* it is clear that the cost of handling this traffic *is not less than the average, which includes both local and through business.* Mr. Hopkins estimates the cost of handling *local* traffic to be *one hundred and twenty-five per cent. more* than the cost of handling through business *(Record, page 75),*—more than double; but

still *there is no way known to any accountant, nor to any court*, of determining the exact cost of carrying one particular commodity, or of carrying local, as compared with through traffic. The fact is emphasized by MR. JUSTICE BREWER in the South Dakota Rate case, in which he says, *at page 178:*

"Beyond the figures given from the books of the company, of the actual cost of doing the total business of the company, there was testimony of several experts as to the relative cost of doing local and through business. *Such testimony is not to be disregarded simply because it cannot demonstrate by figures the exact amount or per cent. of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost, if not quite, impossible to determine the difference with mathematical accuracy.* Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same; but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from the main to side tracks is greater; there are the wages of the employes at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain, that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true, when there are two separate trains, it is more so when the same train carries both local and through freight. *It is impossible to distribute between the two, the relative cost of carriage.* Yet, that there is a difference is manifest; and upon such difference the opinion of experts, familiar with railroad business, is competent testimony, and cannot be disregarded."

The South Dakota Rate Case was reversed, by reason of the failure of the trial court to find the cost of the local business. The case is, in principle, "on all fours" with the case at bar. The order of the South Dakota Commission was sustained by the lower court, upon the same ground stated in the memorandum of the District Court of Ramsey County in this case. Sec. 20 of Chapter 110 of the Laws of South Dakota for 1897, provides, like the law of Minnesota, that the

schedule made by the commission shall be received in all courts as *prima facie* evidence that the rates so fixed are reasonable. The trial court gave the same reason for upholding the rate, as is given in this case, viz: that the exact cost of the local traffic involved in the litigation could not be distinguished and determined, and consequently, that it had not been made to appear that it was unreasonable, and violative of the Federal Constitution. This was held to be reversible error. It was held to be the duty of the trial court to make a comparison of the gross earnings from local business, and the cost of doing the business; that it must consider the evidence before it, including the expert testimony, even if there was not evidence by which the cost of the service could be determined with mathematical accuracy, and although the earnings on local and through business could not be accurately or satisfactorily distributed; *and that it is the duty of the trial court, from the evidence before it, to make a specific finding as to the cost of transacting the business involved in the litigation.* Because the trial court failed to do so, the case was reversed. Upon this branch of the case, I quote again from the opinion of MR. JUSTICE BREWER (at page 172), as follows:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws, and not of men; and by this court, in Yick Wo vs. Hopkins, 118 U. S., 356, 369, 30 L. Ed., 220, 6 Sup. Ct. Rep., 1064: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'

When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, State or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are

the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

X.

The law of Minnesota embodied in Chapter 91, General Laws, 1895, and particularly in subdivisions B, C and D, Section 3, of said Chapter, as well as all laws of said State which assume to confer upon the Railroad and Warehouse Commission the power and authority to compel two or more railroad companies to enter into a joint tariff and to make or adopt a joint rate for the transportation of property over the lines of said company, and which assume to authorize said commission to make a division or apportionment of joint earnings between two or more railroad companies, is violative of the Fourteenth Amendment to the Constitution of the United States.

This question is presented by the third Assignment of errror, by which is is alleged that the Supreme Court of Minnesota, erred:

3. In holding that the law enacted by the legislature of the State of Minnesota, embodied in Chapter 91 of the General Laws of 1895, by which the Railroad and Warehouse Commission of said State is authorized to compel two or more railroad companies to enter into a joint tariff, and make and adopt a joint rate for the transportation of property over the lines of said companies, and which assumes to authorize said commission to make a division of the joint earnings of two or more railroad companies, and to apportion such earnings, is not violative of the Fourteenth Amendment to the Constituton of the United States, in this:

It denies to the plaintiff in error the right to contract in reference to its own business; and thus takes its property without its consent.

It compels the plaintiff in error to enter into involuntary, unreasonable and unprofitable contracts with other carriers at the instance of third parties, resulting in a loss of business and revenue on the part of the plaintiff in error.

It requires the plaintiff in error to enter into involuntary contracts with other carriers.

It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed.

It requires the plaintiff in error to hire and use the cars and vehicles of other carriers in the transportation of traffic upon its own line.

It deprives the plaintiff in error of the right to make its own contracts with other carriers, and delegates, to a non-judicial body, the right to fix and determine the proportion of a joint through rate, which shall be paid to the plaintiff in error; thereby depriving the plaintiff in error of its property, the right to use the same, and the right to contract in relation thereto.

It denies to the plaintiff in error the equal protection of the laws, which protect and insure to all citizens the right to contract in relation to their property, and deprives the plaintiff in error of its property without due process of law.

It abridges the privileges and immunities of the plaintiff in error as a citizen of the United States, by depriving it of the right to control, conduct and manage its own business.

The chapter referred to reads as follows:

CHAPTER 91.

An Act to amend Chapter ten (10) of the General Laws of eighteen hundred and eighty-seven (1887), entitled An act to regulate common carriers and creating the Railroad and Warehouse Commission, of the State of Minnesota, and defining the duties of such commission in relation to common carriers.

Be it enacted by the legislature of the State of Minnesota:

SECTION 1. That section three (3), of chapter ten (10), of the General Laws of eighteen hundred and eighty-seven (1887), be amended so as to read as follows:

SEC. 3 (A). That all common carriers subject to the provisions of this act, shall provide at all points of connection, crossing or intersection at grade, where it is practicable and necessary for the interest of traffic, ample facilities by track connections, for transferring any cars used in the

regular business of their respective lines of road from their lines or tracks, to those of any other common carrier whose lines or track may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of passengers, property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates or charges between such connecting lines or on freight coming over such lines; but this shall not be construed as requiring any common carrier to furnish for another common carrier its tracks, equipment or terminal facilities without reasonable compensation; that each of said connecting lines shall pay its proportionate share for the building and maintenance of such tracks and switches as may be necessary to furnish the transfer facilities required by this act, and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the Railroad and Warehouse Commission, and either party shall have the right to appeal from the order of said commission, fixing the amount so to be paid, to the District Court of the county where said transfer facilities are furnished, by serving a notice in writing, on the adverse party, within ten (10) days after the making and filing of such order by said commission; and upon the service of such notice there shall be pending in said District Court a civil action for the adjustment and determination of the amount to be paid by each carrier for the expense of the building and maintenance of said transfer facilities. Pleadings shall be made and filed in said action, in conformity to those required by law and rules of practice in said court, and said cause shall be tried in the manner provided for the trial of civil actions in the District Courts of this State.

(B). All railway companies doing business in this State shall, upon the demand of any person or persons interested, or upon demand of the Railroad and Warehouse Commission, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this State.

Carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and transfer shall be made without unreasonable delay, under such contract arrangements as such connecting companies may make, or under such rules as the Railroad and Ware-

house Commission may prescribe, as hereinafter provided in this act.

Less than carload lots shall be transferred into the connecting railway cars at cost, which shall be included in and made a part of the joint rates adopted by such railway companies, or established as provided by this act. When shipments of freight to be transported between different points within this State, are required to be carried by two (2) or more railway companies, operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or State traffic as they give to interstate traffic over their lines of road.

(C). In the event of that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, or fail to establish between themselves the rates and terms upon which cars of one company shall be transferred in such through shipments from the line of one company to the other and returned, or fail to provide for the convenient and prompt transfer of such through freight, from the cars of the receiving company to those of the connecting line, it shall be the duty of the Railroad and Warehouse Commission of this State, and said commission is hereby directed, upon the application of any person or persons, interested to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this State, and to prescribe the reasonable rules under which any such cars so transferred shall be returned; and in establishing, changing or revising any such rates they shall take into consideration the average of rates charged by said railway companies operating such connecting lines for joint interstate shipments for like distances.

The rates established by said commission shall go into effect within ten (10) days after the same are promulgated by said commission, and from and after that time the schedule of rates so established shall be *prima facie* evidence in all the courts of this State that such rates are reasonable through rates for the transportation of freight and cars upon the railroads for which such schedule shall have been fixed.

(D). Before the promulgation of such rates or rules, as above provided, the Railroad and Warehouse Commission shall notify the railroad companies interested in the schedule of joint rates fixed by them, and they shall give said railroad companies a reasonable time thereafter to agree upon a division of charges provided for in such schedule; and in the event of the failure of the railway companies to agree upon

such divisions and to notify the board of such agreement, said commission shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by the commission shall, in all controversies or suits between the railroad companies interested, be *prima facie* evidence of the just and reasonable division of such charges.

(E). Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this State is hereby prohibited and declared to be unlawful; and every company or person violating the provisions of this section shall be subject to the penalties prescribed in section twelve (12) of the original act to which this act is amendatory.

(F). Nothing herein contained shall be construed as requiring any railroad company to send its cars over the line of railroad of another company when its own line of railroad runs to and reaches the point of destination or the point of connection with another railroad on which such point of destination is located, or to use its track or terminal facilities at terminal points for the handling of cars or traffics of another or competing company; provided, that in no case shall the charges for transportation exceed the established through joint rates between any two points.

(G). Whenever any property is received by any common carrier subject to the provisions of this act to be transported from one place to another within this State, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided for, the common law liability with reference to such property while in its custody as a common carrier; such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.

SEC. 2. That subdivision "B" of section nine (9) of chapter ten (10) of the general laws of one thousand eight hundred and eighty-seven (1887) is hereby amended by striking out all after the word "office" in line twelve (12) of said subdivision "B," and substituting therefor the following, to-wit:

Said commissioners shall not, while holding office under this act, be interested in any stock or bonds of any common carrier, or in any contract for the construction, repair or maintenance of any railroad, or accept any retainer or employment from any common carrier under the jurisdiction of said commission.

No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

SEC. 3. That subdivision "D" of section fifteen (15) of chapter (10) of the general laws of one thousand eight hundred and eighty-seven (1887), as amended by chapter one hundred and six (106) of the general laws of one thousand eight hundred and ninety-one (1891), is hereby amended by inserting in line two (2) of said subdivision "D," after the word "commission," the words, "Or any party to any proceeding before said commission and affected by its order."

SEC. 4. This act shall take effect and be in force from and after its passage.

Approved April 25th, 1895.

This law denies to this plaintiff in error the right to contract in reference to its own business, and thus takes its property without its consent; it compels it to enter into involuntary, unreasonable and unprofitable contracts with other carriers at the instance of third parties, resulting in a loss of business and revenue; it requires the plaintiff in error to enter into involuntary contract relations with other carriers, designated by third parties; it assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed; it requires the plaintiff in error to hire, and use the cars and vehicles of other carriers, in the transportation of traffic upon its own line; it deprives it of the right to make its own contracts with other carriers, and delegates to a non-judicial body the right to fix and determine the proportion of a joint rate which shall be paid to the plaintiff in error, thereby depriving it of its property, the right to use the same, and the right to contract in relation thereto; it denies to it the equal protection of the laws which protect and insure to all persons the right to contract in relation to their property, and thus deprives it of its property without due process of law; it abridges its privileges and immunities by depriving it of the right to control, conduct and manage its own business.

The authority of the State to compel two or more carriers to enter into a joint tariff, under any circumstances, is denied by this defendant.

That railroad companies are subject to State control,

and reasonable regulation, is conceded. That in some respects such control and regulation goes beyond that which may be exercised over the affairs and business of individuals, is also conceded. Railroad corporations are, however, invested with some rights, personal to the corporation, which are as inviolate as the personal rights of individuals.

It is conceded that the State, acting through its proper agencies, may protect the public against unreasonable and unjust charges for services rendered by railroad companies—may require the business of such corporations to be so conducted as to afford reasonable and proper protection to person and property—may require compliance with all reasonable police regulations, and compel the carrier to furnish adequate and convenient facilities for the transaction of its business with individuals and with the public.

The State, however, cannot deprive the carrier of the right to manage and control its own business. While it must manage its business in conformity with the reasonable regulations and requirements of the State government, it nevertheless retains the right to actually manage and control its own property and business.

By the statute in question the State assumes to take charge of, and control, the business of the plaintiff in error.

The power of the State, to compel the defendant to make reasonable and just charges for transporting coal upon its own line of railway, is one thing. The existence of that power may be safely conceded. The power of the State, to compel the plaintiff in error to enter into a joint through tariff with another carrier is another thing; and such power is denied. One, is a requirement that the plaintiff in error perform the duty to the public (for the performance of which duty it was created); and carry merchandise, over its own line, for a reasonable compensation. The other, is a requirement that it enter into contract relations, with another carrier, involving the exercise of its franchise beyond its own line, and deprives it of the right to fix the terms of the contract to which it is party.

The duty of a carrier to receive and transport all merchandise tendered to it at points upon the line of its own railroad is conceded. The duty, however, is not imposed

until the shipment is tendered. While it is bound to receive all merchandise tendered, it cannot be compelled to contract in advance to do so. The law furnishes the contract; and the contract is that the carrier will receive merchandise tendered for carriage at points upon its own line—that it will transport such merchandise safely to destination, and that it will charge and receive a reasonable conpensation for such service. The charge made may be for all services rendered by itself, and may be reasonable. The charge *may* be *less* than the service is worth; it *must not be more.* A carrier's local rate must not exceed a reasonable charge for the service rendered—if it be so, the rate is unlawful. If the local rate is not unreasonable, and consequently not unlawful, no commission or court can reduce it. The reasonableness of the rate is dependent upon the service rendered—not upon the identity of the shipper nor the ownership of the property transported. If a charge for the transportation of a car load of coal from Minneapolis to New Ulm for an individual shipper residing in Minneapolis, to an individual living in New Ulm, is reasonable and just, the *same* rate is reasonable, and may be collected, if the car load of coal is delivered to us at Minneapolis by the St. Paul & Duluth Railroad Company, and is consigned to a dealer in fuel at New Ulm. If the local rate of $1.25 per ton from Duluth to Minneapolis is reasonable, the value of the service and the reasonableness of the rate is not affected by the fact that, at Minneapolis, the coal is delivered to another carrier, instead of an individual. The local rates are presumed to be reasonable until declared otherwise. In this case, the local rate from Duluth to Minneapolis has been approved by the commission. The local rates of the plaintiff in error has never been questioned or disapproved. If the local rates are reasonable, by what kind of logic can the sum of the locals be held unreasonable, for identical service?

The defendants may severally be compelled to make reasonable *local* rates if they refuse to do so. They have *not* refused. The defendants cannot be compelled to make a joint through rate less than the sum of the two *reasonable* local rates. They may do so voluntarily, but may not be

compelled to do so. *They cannot be forced to contract. That is a personal right.*

Requiring each to carry merchandise over their respective lines of railroad, at a reasonable price, is "regulation" and lawful. Requiring them to render the same service where the same property passes over the same rails, at a less rate, because one receives it from the other, is "confiscation;" and violates the Federal Constitution. It violates the right of the carrier to contract in relation to its own business; which is both a personal right and a property right, and takes our property without due process of law. The State may compel each carrier to transport coal over its line at a reasonable rate; *but the rate cannot be made dependent upon the fact that the traffic does, or does not, originate upon another railroad.* The State cannot compel a carrier to discriminate in favor of traffic received from a connecting carrier. Joint tariffs, and joint rates, are the subject of contract; and cannot be established by compulsion. No carrier can be compelled to enter into a joint tariff or be compelled to join in a through rate.

The power to regulate commerce does not include the power to interfere with private contracts.

Railroad Company vs. Richmond, 19 Wallace, 589, 590.

Every carrier has the absolute right to limit its business to the transaction of business upon its own line. It cannot be compelled to become a party to any arrangement, agreement, contract or tariff concerning the transportation of persons or property beyond the railroad it operates. Its franchises derived from the State are limited to the property it actually controls. Its duties and obligations, as well as its powers, are limited by its charter. The reasonableness of its charges are determined *by the service rendered by it upon its own rails—not by the place where the traffic originated, nor by the question, whether it was tendered for carriage by an individual, or connecting carrier.* A joint tariff, means that the receiving, or initial carrier, may contract for the transportation of property, over the line of the connecting carrier, to destination at the tariff rate; and authorizes it to bind the other carrier to the performance of the contract. The act

under which the order is made, requires the initial carrier to deliver its cars to another company, and requires the connecting carrier to use the cars of another company to the exclusion of its own.

Our proposition of law is this:

The State has no power to compel two or more carriers to make a joint rate or a joint tariff; it has no authority to apportion a joint tariff or rate between the carriers interested.

When the State assumes to do either of these things it assumes to deprive the carrier of the right to contract in reference to its own business—to deprive it of the control of its own property—to interfere with the enjoyment and exercise of its charter rights and franchises, and to compel service without just and adequate compensation; whereby, it deprives it of its property without due process of law. It denies it the equal protection of the law, and violates the Fourteenth Amendment to the Federal Constitution.

Mr. Justice Field held, in *Oregon Short Line, etc., Co. vs. Northern Pacific R. R. Co., 51 Fed. Rep., 470 (affirmed at 9. C. C. A. page 409)*, that neither at common law, nor under the Interstate Commerce Act, can a railroad company be compelled to haul the cars of another company over its line, if it has cars of its own, which it desires to use for the transportation of traffic; nor can one carrier be required to advance or assume payment of the freight charges due a preceding carrier. Such matters are regulated by contract.

It is held in *Railway Co. vs. Railway Co., 41 Fed. Rep., 562*, that a court cannot require a railroad company to contract with another carrier, engaged in like traffic, for a joint through routing and joint through rate, nor can the court make such a contract for the parties.

And see:

Railway Co. vs. Osborn, 52 Fed. Rep., 914;
Railway Co. vs. Railway Co., 59 Fed. Rep., 400;
Kentucky & I. Bridge Co., 37 Fed. Rep., 625;
Railway Co. vs. Railway Co., 41 Fed. Rep., 559.

One carrier cannot constitute itself the agent, to collect advance charges, for another. The State cannot compel one

carrier to permit another carrier to act as its agent, in receiving shipments, advancing or collecting charges, selecting routes, contracting for transportation, or controlling and managing its rolling stock.

I have been unable to find that any court of last resort has heretofore committed itself to the proposition that a State is invested with a power so arbitrary. It is true that the Supreme Court of Iowa in the case of *Railroad Co. vs. Dey et al., Railroad Commissioners, 82 Iowa, pages 312, 338,* held in favor of the validity of a similar act. But the same court, in the same case, upon a second appeal, disapproved that holding. While it was held that, upon the second appeal, the ruling first made must stand as the law of *that case,* the Court said:

"In thus disposing of this case, we are not to be understood as approving of the correctness of the former holding. Some of us are content with the result reached in the former opinion; others, the writer included, do not approve of some of the reasons and conclusions found in the opinion rendered by a majority of the court as then constituted, and do not wish to be considered as bound by it in any other case."

See 89 Iowa, page 25.

A statute like this was was held by the Supreme Court of Nebraska to be violative of the Federal Constitution.

State ex. rel. Board of Transportation vs. Railroad Co., 46 Nebraska, page 682.

Mr. Justice Field, in *County of Santa Clara vs. Southern Pacific R. R. Co., 18 Fed. Rep., 406,* said:

"The doctrine of unlimited power of the State over corporations, their franchises and property, simply because they are created by the State, so frequently and positively affirmed by counsel, has no foundation, whatever, in the law of the country. By the decision of the Supreme Court of the United States in the Dartmouth College Case, it was settled, after great consideration, that the charter of a corporation, under which its franchises—its capacity to do business and hold property is conferred, is a contract between the corporators and the State, and therefore within the protection of the Federal Constitution prohibiting legislation impairing the obligation of contracts. So far from the State

having unlimited control over the franchises and property of corporations, because of its paternity to them, it has under that decision *only such as it possesses over the contracts and property of individuals.*"

The State statute can only be made effective by interference with the right of private contract. When two railroad companies have voluntarily connected their lines of railroad, and entered into an arrangement for the transfer and continued transportation of traffic, the independent line thus voluntarily created, is subject to the same degree and character of State regulation, as other lines. The question of *regulation* of a joint line voluntarily created, and the compulsory *creation* of such lines, are distinct. If two individuals enter into a co-partnership, such co-partnership is subject to all laws regulating co-partnerships. It does not follow that the individuals can be compelled to form the co-partnership.

It is settled, beyond argument, that, at common law, two carriers cannot be compelled to enter into contracts by which one can be compelled to haul the cars of the other, or to make joint tariffs with the other, or advance the charges earned by the other.

The remaining question is as to the power of the legislature to compel that which may not be done by the courts under the common law. This power is limited by the constitution. By the terms of the act in question, the carriers are required to establish joint rates for through shipments, and for the transfer of cars and freight. If they fail to do so, the act assumes to delegate to the Railroad and Warehouse Commission the power to do so.

We deny that such power can be delegated to the commission, because it is a power which the State, itself, does not possess. It goes beyond the establishment of a uniform maximum rate for railroad transportation. It is the establishment of *contract relations* between two companies, and the rates and terms under which two designated carriers must do business, not only with the public, but with each other.

The right of a citizen to contract, relative to his own business, is both a property right and a right of personal liberty, and cannot be taken away.

Frorer vs. The People, 141 Illinois, page 181;
Braceville Coal Co. vs. The People, 147 Illinois, page 71;
Harding vs. The People, 160 Illinois, page 65.

The authority of the State does not extend to intermeddling with the contract relations between carriers, *nor establishing rates for the transportation of particular commodities over one section of a carrier's railroad; nor fixing a special rate for the transportation of traffic originating upon the line of a particular carrier.* Its authority is limited to making a *uniform* rate applicable to *all* lines and *all localities;* variable only by existing conditions, the existence of which must be shown.

The commission cannot select a certain section of the carrier's property, and fix a rate for transporting, over it, a certain commodity, originating on the line of another carrier; and compel the terminal carrier to accept as compensation for transporting that commodity, a sum less than its existing reasonable local rate, for the same service.

The Fourteenth Amendment to the Federal Constitution secures, not only the right of the citizen to be free from mere physical restraint of his person, but to be free in the employment of all his faculties; to use them in all lawful ways; to live and work where he will, and earn his livelihood in any lawful manner; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper, necessary and essential to his carrying out the purposes above mentioned. These rights are inalienable.

United States vs. Sweeney, 95 Fed. Rep., 450;
Allgeyer vs. Louisiana, 165 U. S., 589;
United States vs. Sweeney, 95 Fed. Rep., 450.

Corporate rights, and individual rights, are alike entitled to the equal protection of the laws, which are framed to effectuate the principles declared as the basis of our right to self-government and independence. The declared purpose of the State is to deprive the appellant of the right to make its own contracts, select its own connecting carriers, agree

upon the division of joint earnings, and manage its own railroad. It proposes to create traffic contracts, by which the plaintiff in error can be compelled to divide its earnings, and its business; to compel it to enter into joint tariffs, and render service without compensation.

XI.

The fourth assignment alleges that the State court erred:

"In holding that the law of the State of Minnesota, by which it is held, that in estimating and computing the cost of operating a railway, per ton of freight, per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates, it is error to take into consideration any part of the earnings applied to the dividends upon the capital stock of such railway, does not violate the Constitution of the United States."

The question directly presented by this assignment, was considered and argued in the second subdivision of this brief, in connection with the first and second assignments of error. It resolves itself into this: Is a railroad carrier, as a matter of legal right, entitled to earn and receive *some* profit upon its invested capital? The question was answered in the affirmative, by MR. JUSTICE MCKENNA, in the case of *Southern Pacific Company vs. Board of Railway Commissioners, 78 Federal Reporter, 236*, hereinbefore cited.

The question involved in the case at bar, is as to the right of the carrier to earn *any* dividend; not the amount of dividend.

XII.

The act of the State Legislature is violative of Section 10, of Article I, of the Constitution of the United States. It violates the Charter Contract with the Plaintiff in Error.

The legal duty of the plaintiff in error is commensurate with its franchise; its franchise is confined to the transaction of business on its own line of of road, and cannot be made to extend beyond it.

The People of the State of Illinois, ex rel. Hempstead vs. The Chicago & Alton Ry. Co., 55 Ill., 95.

The case cited, also recognizes, and asserts the proposition that two parties cannot be compelled to contract.

A railroad company is guaranteed, by its charter, the right to build a railroad and—having built it—the right to operate it. The purpose of the construction of a railroad is to earn money. Its methods of earning money are limited to the carriage of passengers and freight. The value of its property, including its franchise, is dependent upon its earning capacity. As the value of its property, its solvency and its existence are dependent upon its earnings, its charter contract gives it the legal right to charge and collect a tariff which will afford it reasonable compensation for the service rendered. The charter includes a contract, that the State, which grants it, will not destroy the value of the carrier's property by compelling it to render service without just and reasonable compensation.

Coke Company vs. Cleveland, 71 Fed. Reporter, 610.

The State of Minnesota by this act assumes:

1. To compel two railroad companies to make a joint rate for the transportation of traffic. *Sec. 3 (B), Act of 1895.*

2. To compel the initial carrier to deliver its cars to the competing line; or, as an alternative, to transfer car loads of freight into the cars of the other company without charge. *Sec. 3 (B), Act of 1895.*

3. To compel the initial carrier to transfer less than car load lots, at cost. *Sec. 3 (B), Act of 1895.*

4. To compel the connecting carrier to hire the cars of the competing initial carrier, for the continued transportation of the goods.

Subdivision "F" of Section 3, of the act, provides as follows:

"(F). Nothing herein contained shall be construed as requiring any railroad company to send its cars over the line of railroad of another company, when its own line of railroad runs to and reaches the point of destination or the

point of connection with another railroad on which point of destination is located; or to use its track, or terminal facilities at terminal points, for the handling of cars or traffic of another or competing company; *provided*, that in no case shall the charges for transportation exceed the established through joint rate, between any two points."

Under the provisions of this section, the plaintiff in error is relieved from delivering its cars to its competitor; but, as an alternative, is subjected to the burden of transferring their contents into the cars of the connecting carrier without compensation; the tariff being carefully limited, by the proviso, to the "through joint rates."

This requirement, by which the plaintiff in error is required to render service, in making such transfer, without compensation, constitutes a violation of the charter contract and deprives it of its property without due process of law.

XIII.

The fifth assignment of error alleges that the Supreme Court of Minnesota erred:

"5. In holding that the State law, which, under the guise of a so-called 'commercial necessity,' assumes to compel railway carriers to transport freight over their lines of railway for a rate less than the actual cost of such service, does not violate the Fourteenth Amendment to the Federal Constitution, by depriving such carrier of its property without due process of law, and by denying the equal protection of the laws, which insure to all citizens the right to earn, and receive, a reasonable compensation for service rendered, and a reasonable profit over and above the actual reasonable cost of such service."

The questions presented by this assignment have been discussed.

The sixth assignment, which asserts the right of the plaintiff in error to earn a dividend equal to the rate of interest recoverable by statute, in the absence of contract, need not be separately discussed, as the decision rests upon the proposition that *all* dividends and *all* profits should be excluded. The position of the plaintiff in error may be

stated as follows: Proof that a rate of interest, less than the statutory rate, is customarily accepted as fair compensation for the use of invested capital, might warrant a finding to that effect; but, in the absence of all proof, the statutory rate or interest is, *prima facie*, reasonable, and is not excessive.

XIV.

The seventh and ninth assignments of error may be considered together. These assignments allege error upon the part of the State court:

"7. In holding that the State of Minnesota, acting through its Railroad and Warehouse Commission, has the right, power and authority to compel the plaintiff in error to enter into a joint rate, or make and perform an agreement, with another carrier, for the transportation of property over the lines of both companies."

"9. In holding that the State of Minnesota has the right, power or authority to make and enforce a law which declares and determines the manner and proportion in which money earned, by two or more carriers, in transporting merchandise over two, or more, connecting lines, shall be divided between the several carriers."

These questions have been, to some extent, considered in the argument of the third assignment of error, in the eighth division of this brief.

If this law is upheld, it means that a railroad carrier may be deprived of the control of its own business. A *joint* rate, means a single through rate for transportation, from a point of origin upon one railroad, to a point of destination upon another railroad. There may be one or more intermediate carriers. The independent route, thus established by the State, may include parts of several distinct and independent railroads.

Many perplexing questions are presented by the enforcement of this law. Conditions are created which are irreconcilable with individual rights. In the case at bar, the order of the commission fixes a definite, specified sum, as the rate, per ton, for transporting coal, *in car loads*, from Duluth to

certain designated stations upon the railroad of the plaintiff in error, and to certain other designated stations upon the railroads of other carriers, *who are not parties to the proceeding.*

The St. Paul & Duluth Company deducts, from the through rate, one dollar per ton, for the service rendered in transporting the coal from Duluth to Minneapolis. The remainder of the rate, in excess of one dollar per ton, *is to be paid to the plaintiff in error*, as full compensation for transporting the shipment *to destination.* See page 28, printed Record, paragraph 31. This obliges the plaintiff in error to make settlement, from the sum paid to it, with the connecting carrier upon whose line the point of destination is situated. Of the twenty-eight stations, designated by the order, *fifteen* are situated upon the railroad of the plaintiff in error; *three*, upon the Minneapolis, New Ulm & Southwestern Railroad, and *ten* upon the Wisconsin, Minnesota & Pacific Railroad. As neither of the two last named railroad companies are parties to this proceeding, they may each demand and receive their full reasonable local rates for transportation over their own railroads. The order of the commission does not assume to divide the rate, between the plaintiff in error and the terminal carriers, although thirteen of the twenty-eight stations designated are situated upon other railroads. While it is true that the plaintiff in error owned the stock of the Minneapolis, New Ulm & Southwestern Company, it is also true that the Wisconsin, Minnesota & Pacific Company, upon whose railroad *ten* of the designated stations are situated, is in every particular, including ownership, control and operation, wholly independent.

The fact that the plaintiff in error owned the stock of the Minneapolis, New Ulm & Southwestern Company, does not make it responsible for its management.

Pullman Car Company vs. Missouri Pacific Co., 115 United States, 587, 597;

Fitzgerald vs. Missouri Pacific Co., 45 Federal Reporter, 812, 818-819;

Farmers Loan & Trust Company vs. Chicago, P. & S. Ry. Co., 39 Federal Reporter, 143; 157;

Atchison, Topeka & Santa Fe R. R. Co. vs. Cochran, 43 Kansas, 225;
Winona & St. Peter Railroad Company vs. St. Paul & Sioux City Railroad Company, 23 Minn., 359;
Richmond & I. Construction Co. vs. Richmond, N. I. & B. Co., 68 Federal Reporter, 105, 108.

The petition for the alternative writ of mandamus is directed to the through transportation of hard coal, from Duluth to the stations designated, *in car load lots.* (Record, page 16). The order of the commission, and the judgment of the State Court, require the plaintiff in error to (1) receive the coal in the cars of the initial carrier; (2) accept the joint rate fixed by the order and judgment; (3) accept the division and proportion of the joint rate, made and fixed by the commission; and, (4) out of its proportion of the joint rate, settle with and pay the terminal carriers, who are not parties to this proceeding.

Compliance with the order, practically deprives the plaintiff in error of the control of its own property. If the State is to control the movement of cars, compelling a carrier to surrender its rolling stock to its connecting carriers, without regard to their solvency, or its own need for its cars, in its own service; fix the rates to be charged; determine what proportion of the rate each carrier shall have; compel one carrier to act as agent for collecting the earnings of another; permit other carriers to make its collections, there is little left to a railroad corporation by way of supervising its own business. If a carrier uses the cars of a connecting line, it must pay for their use, though its own cars stand idle. If it refuses to use the cars of the initial carrier, it must transfer the merchandise at its own cost and expense. If it delivers its cars to an irresponsible and insolvent line, they may be lost. The initial carrier cannot compel the connecting carrier to pay its charges, nor can the initial carrier be obliged to collect in advance and account for the earnings of another railroad company; one carrier cannot be *compelled* to contract to deliver shipments beyond its own line.

In *Illinois ex rel. Hempstead vs. Railway Company, 55 Ill., 95*, it is held that:

"Railroad companies cannot be compelled, as common carriers, to receive goods at stations along their line, for transportation, on the requirement of the consignor that they shall, themselves, deliver the goods at a point beyond or off their own line of road; or to deliver goods received by them for transportation, at such point. The legal duty of the companies, in that regard, is commensurate only with their franchise; it is confined to their own line of road, and cannot be made to extend beyond it."

This law requires it. If the order of the commission, and the law under which it is made, cannot compel a carrier to contract for carriage, and make delivery beyond its own line, both the order and the law must fail. If enforced, railroad carriers are obliged to exercise their franchises beyond their own property, by contracting for delivery upon other railroads and by sending its own cars over other lines. *The law requires carriers to do, and to undertake to do business upon the railroads of other carriers.* Under the provisions of this chapter, we find that we have all the railroads of the State united in *one* system. Rates fixed by the State; points of connection and transfer fixed by the State; movement of rolling stock directed by the State; earnings divided by the State; competition prevented by the selection of routes and fixing of rates by the State; the creation of new lines of transportation by the State, composed of sections of existing independent lines.

Property has value in proportion to its productiveness. Productiveness is dependent, largely, if not wholly, upon control. The right of control is the most valuable incident to the ownership of property. This statement is particularly true, as applied to income-producing property. As applied to railroads, which are created, constructed and operated with the sole purpose of producing revenue, the statement is axiomatic. To deprive a railroad company of the power to control its own property, to take away its right to select the carriers with which it will enter into traffic contracts; to deny it the right to avail itself of the best bargain it can make in the way of division of joint earnings, where

competition between connecting carriers makes it possible to contract to its own advantage; would diminish, and in many cases destroy the value of the property. Railroads are operated upon business principles; and in order to operate them safely and remuneratively, their managers must have the same freedom to contract, and to take advantage of business and commercial conditions, as that possessed by an individual in his personal and smaller business.

One of the most important incidents of railway operation, is the making of judicious traffic contracts with other carriers. Railroad corporations, like individuals, have the right to choose their own business associates. The responsibility of the connecting carriers, their methods of doing business, the manner in which the joint earnings are divided, etc., are matters which figure prominently in traffic agreements. No law which presumes to compel a carrrier to enter into involuntary contract relations with another, is valid. If two or more carriers, by voluntary arrangement, create a joint line composed of parts, or all, of the railroads of the several carriers, the State may see that the rates charged for transportation over such joint line, are reasonable. It cannot determine how such joint earnings shall be divided between the carriers. That is a matter of private right, with which the State has no concern. If the shipper pays no more than a just and fair rate, it is immaterial to him, or to the public, how the earnings under such joint rate are divided. No legal excuse, or occasion, can arise for the exercise of the assumed power to enforce the making of a joint tariff. The local rate of each carrier must be reasonable. This, the State compels. Every carrier must accept merchandise tendered to it for carriage. This, the law compels. The sum of two reasonable local rates cannot be unreasonable. The shipper can therefore have his goods transported at reasonable rates, without a joint through rate. The carriers may make a joint rate; they cannot be compelled to do so. They may make a joint through rate less than the sum of the reasonable local rates; they cannot be compelled to do so. Each, or either, may contract to accept and use the rolling stock of the other; each or either, may contract to send its cars over the tracks of the other; it cannot be compelled to

do so. These are all matters of private contract. The right of a citizen to contract, relative to his own business, is both a property right and a right of personal liberty, and cannot be taken away.

The Fourteenth Amendment to the Federal Constitution secures, not only the right of the citizen to be free from mere physical restraint of his person, but to be free in the employment of all his faculties; to use them in all lawful ways; to live and work where he will, and earn his livelihood in any lawful manner; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper, necessary and essential to his carrying out the purposes above mentioned. These rights are inalienable.

United States vs. Sweeney, 95 Fed. Rep., 450;
Allgeyer vs. Louisana, 165 U. S., 589.

There are certain fundamental rights, possessed by every citizen, which are recognized in the organic law of every State. A statute which violates any of these rights is unconstitutional and void. The right to acquire and possess property includes the right to contract. This right is not created or conferred by the constitution. It is one of those fundamental rights, older than any written law, the existence of which is pre-supposed, as the basis of political government. It is one of those existing and fundamental rights, the continuance of which is guaranteed by the constitution; not created by it. The owner of property has a right to its independent enjoyment, subject only to the reasonable regulation necessary to prevent its use to the injury of others. This cannot be had, if he be deprived of the right to contract in relation to its use.

"The law of contracts," says Mr. Parsons, "may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts grow all rights, all duties, all obligations, and all law." The exercise of the right to contract, enters into every transaction of business or social life, and cannot be limited or controlled by legislation, ex-

cept where its exercise conflicts with public policy, or is violative of law.

The effect of the statute under consideration is to deprive the plaintiff in error of the right, (1) to control its own business; (2) to make its own traffic contracts; (3) to select the carriers with whom it will enter into traffic agreements; (4) to determine whether or not it will join other carriers in the creation of joint lines; (5) to charge and collect its own reasonable local rate for the transportation of property over its own line, to the point of intersection with the road of a connecting carrier; (6) to determine and decide whether or not it will deliver its own rolling stock to a connecting carrier for use upon other railroads; (7) to select the connecting carrier to whom it will deliver goods committed to its care for transportation beyond its own line; by reason of which it is without security for the safety of goods, or its own charges for transportation.

XV.

By the eighth assignment, it is alleged that the State Court errred in this:

"In holding that the State of Minnesota has the right, power or authority to make and enforce a law, by which two connecting carriers may be compelled to transport shipments, passing over two or more lines, for a less, or different rate or tariff than the sum of the reasonable local rates, or tariffs, of the several carriers."

The local tariff of the St. Paul & Duluth Railroad Company, the initial carrier as to the traffic involved in this case, for the carriage of hard coal from Duluth to Minneapolis, is $1.25 per ton. *This was admitted to be a reasonable rate, and was adopted, by the commission, as the basis for the joint through rate.* See testimony of Ira L. Mills, chairman of the Railroad and Warehouse Commission, page 76 of the printed Record. It is admitted that the local rates of the plaintiff in error, for transporting coal, from Minneapolis to the various stations designated, was considerably in excess of the balance of the joint rate, made by the commission, after deducting the proportion awarded the St. Paul & Du-

luth Company. The result of the enforcement of the order of the commission is this: (1) it is admitted that $1.25 per ton, is a reasonable local rate for transporting coal from Duluth to Minneapolis, over the St. Paul & Duluth Railroad, *which does not extend beyond Minneapolis;* (2) the right of that company, to charge and collect $1.25 per ton, for that service, is conceded, by the commission and the State; (3) but if the coal is carried beyond Minneapolis, *on another railroad,* the St. Paul & Duluth Company, the *same carrier,* is required to accept a reduction of 25 cents per ton; 20 per cent. of the *reasonable* local rate, *for exactly the same service.* Following the case further: The plaintiff in error may transport coal from Minneapolis to any of the designated stations, and charge for such service its regular local rates, *the reasonableness of which are not questioned.* If it receives *the same coal* from the St. Paul & Duluth Company, at the same point (Minneapolis), and transports it to the same destination, it must accept less compensation *for the same service,* simply because it received the shipment from the Duluth Company. The sum of two *reasonable* local rates, *cannot* be unreasonable. There has been much litigation to establish the right of carriers to make a lesser proportionate rate for a long haul, where the both hauls have been over the same railroad. In Iowa, plaintiff in error has to look to the statute (Sec. 2152, Code of Iowa, for 1897) for *permission* to make a joint rate which is less than the sum of the local tariffs; yet, the State of Minnesota assumes to determine, that two reasonable local rates make an unreasonable joint rate, the service rendered by the several carriers being identical in each case; and the service rendered by each, being confined to its own road. The enforcement of this statute deprives the plaintiff in error of the right to contract in relation to its own business, a right which is both a personal right and a property right, and cannot be taken away. It denies the equal protection of the laws and takes its property without due process of law.

XVI.

The enforcement of the order of the Commission will oblige the Plaintiff in Error to discriminate in favor of certain localities, and citizens, as against other localities and citizens.

This question is presented by the tenth and eleventh assignments of error, by which it is specified that the State Court erred:

"10. In holding that the State of Minnesota has the right, power or authority to make and enforce a law whereby a railroad carrier may be compelled to transport traffic originating upon the line of another railroad, designated by the Railroad and Warehouse Commission, at a different and less rate than it may lawfully collect and receive for the same service, where the traffic originates upon its own line; thereby forcing defendant (plaintiff in error) to give a preference and discriminate in favor of certain traffic and certain localities.

11. In holding that the State of Minnesota has the right, power or authority to make and enforce a law, whereby a railroad carrier may be compelled to charge and collect different rates, per ton, per mile, for traffic originating upon other railroads, from that collected for traffic local to its own railroad; notwithstanding the service rendered is identical."

Both state, and interstate law, forbids discrimination.

Section 2, of Chapter 10, General Laws of Minnesota for 1897, reads as follows:

"SEC. 2 (a). That all charges made by any common carrier, subject to the provisions of this act, for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful.

Provided, That one car load of freight of any kind or class shall be transported at as low a rate per ton, and per ton per mile, as any greater number of car loads, of the same kind and class from and to the same points of origination or destination.

(b). It shall be unfawful for any common carrier, subject to the provisions of this act, to make or give any un-

equal or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any unequal or unreasonable prejudice or disadvantage in any respect whatsoever."

In the face of this positive, statutory prohibition, the order of the commission compels discrimination.

A train laden with hard coal, in car loads, starts from Duluth and stops at Minneapolis; one-half of the cars are delivered on the track to a local dealer or consumer; the local rate of $1.25 per ton, can lawfully be collected. The balance of the cars, in the same train, are delivered to the plaintiff in error, for transportation to some one, or more, of the stations named in the order of the commission; upon these cars the tariff collected for identical service, is *one dollar* per ton.

Hard coal is within the appellant's local classification "D." (Record, page 91.) Upon a shipment of hard coal which originates in Minneapolis, it can charge the consignee, or the shipper, its regular local rate; if it receives the same coal from the St. Paul & Duluth Company, at Minneapolis, and transports it to the same destination, it can charge only the rate fixed by the commission. Coal received from the St. Paul & Duluth Company must be carried at one rate; coal received from a local dealer at Minneapolis, at another rate. Coal delivered to the plaintiff in error pays a rate of $1.00 per ton from Duluth to Minneapolis; coal delivered to a Minneapolis dealer pays $1.25 per ton from Duluth to Minneapolis. The rate fixed by the commission, for hauling a ton of hard coal from Duluth to Minneapolis, is not made dependent upon the service rendered, nor the cost or value of the service; it is made dependent upon the identity of the consignee, or the person to whom it is delivered. It is held by the State Court, that a carrier must charge less for the transportation of coal delivered to a connecting carrier, than for the same coal, hauled in the same car, over the same rails, in the same train, if delivered at the same place, to an individual. It is held, by the State Court, that the plaintiff in er-

ror may charge its local rate for transporting a car of coal from a dealer in Minneapolis to a dealer in Boyd, and a less rate for hauling the same car load, if received at Minnneapolis from its co-defendant. This is plainly unlawful discrimination.

Lake Shore, &c., Railway vs. Smith, 173 United States, 690, and succeeding pages.

The reasonable local rate, made by a carrier, is held, by the commission, to become unreasonable, if the traffic is forwarded beyond its line, over the road of another carrier.

The commission has made an order, which is utterly indefensible from any standpoint. If the local rates of the several carriers are reasonable, the sum of the locals is not unreasonable; the combined service being identical with the service rendered, by them, severally.

XVII.

The twelfth assignment alleges that the State Court erred:

"In holding that the evidence does not show, conclusively, that the cost of the service required by the State, through its Railroad and Warehouse Commission, is greater than the revenue to be derived from the proportion of the joint rate awarded to the plaintiff in error."

The State Court held, that in estimating the cost, per ton, per mile, of transporting freight, for the purpose of determining the cost of operation, no allowance must be made for dividends. This question was determined, in favor of the contention of the plaintiff in error, in the *Southern Pacific case, 78 Federal Reporter, page 236*, the opinion being by Mr. Justice McKenna, at Circuit.

The State Court has based its estimate of the cost of operation, upon an average cost of doing *all* business; both State and interstate. This is contrary to law, and the decisions of this Court. Such a rule devotes the revenue from interstate business to the payment of the cost of transacting local business. The State Court utterly disregards and ignores the positive and direct testimony, that the cost of the

service required is much greater than the revenue returned by the tariff, fixed by the commission. *This testimony is uncontradicted; the method of computation is conceded to be correct; and was accepted and adopted by the State's accountant,* MR. YAPP. (Record, page 106.) To escape the inevitable result of the computation, the accountant excluded interest on bonds and dividends; both of which are proper items. More than this: *if all dividends paid, were excluded; still the tariff, fixed by the commission, would not equal the admitted cost of operation.* (Ante, pages 34, 35.) The record contains no evidence which tends to contradict the claim, and evidence, of the plaintiff in error, that the cost of service exceeds the possible revenue, to be derived therefrom, under the order of the commission.

XVIII.

By the thirteenth assignment of error, it is alleged that the State Court erred:

"In holding that in order to show that the rate fixed by the Railroad and Warehouse Commission is unreasonable, the plaintiff in error is bound to show the exact cost of transporting *each particular commodity;* and that such fact is not established by proof that the cost per ton, per mile, of transporting *all* merchandise is more than the rate per ton, per mile, fixed by the order of the commission."

I again call attention to the memorandum of the District Judge, at pages 111-112 of the printed Record, in which he says:

"While it may be the fact, that the rates fixed are less than the cost of transportation, as claimed by the defendants, the evidence does not show it. *It is, perhaps, proved that the cost of carrying all freight, is greater than the revenue the Minneapolis & St. Louis Company would derive, if the rate fixed by the commission for "coal in car load lots" was to be applied to all freight.* But "coal in car load lots" is a comparative insignificant item in the total freight carried by the company; and, it must be conceded, that the cost of transporting coal in car load lots, per ton, per mile, is considerable less than the average cost for all freight. It is not only (not) shown by the testimony what the cost per ton, per mile, for

carrying hard coal, in car load lots is, but there is no testimony in the record, which enables me to make even a fair guess as to what it is; or as to whether it is less, or greater than the rate, per ton, per mile, allowed under the rate fixed by the commission. *In other words, proof of the cost per ton, per mile, of transporting all freight, furnishes no data from which I am able to estimate the cost, per ton, per mile, for transporting "hard coal in car load lots."* This cost being unknown, it is impossible to say that the rates fixed by the commission will not yield the company a fair revenue."

This conclusion, reached by the district judge, seems to have been accepted and adopted by the State Supreme Court. The proposition, that any carrier can determine the exact cost of carrying each particular commodity, is too absurd for argument. It is disposed of, by the opinion of MR. JUSTICE BREWER, in the *South Dakota Rate Case, 176 U. S., pages 177-8*, which has been quoted in the ninth sub-division of this brief, at page 37.

XIX.

The fourteenth assignment, alleges error by the State court:

"In holding that there was not competent and sufficient evidence of the capitalization, cost and value of the railroad of the plaintiff in error."

The State Court held, upon this question, that proof had not been made under the rule established by that court in the *Steenerson Case, 69 Minn., 353;* but proof was made under the rule established in the *Ames Case, at 64 Federal Reporter, page 177.* The State Court does not question the relevancy or competency of the evidence offered, and received. It does not question the correctness of the rule declared in the Ames case (supra); it is not denied that there is more than one way to prove the value of railroad property; nor is it denied that the evidence introduced and received was pertinent and competent. It was said in the *Ames Case* (64 Fed. Rep. 177), that

"It is not easy to always determine the value of railroad

property; and if there is no other testimony, in respect thereto, than the amount of the stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other, of these, represents it; and computation as to the compensatory quality of rates, may be based on such amount."

In the case at bar, the plaintiff in error proved the amount of stock and bonds outstanding; it also proved the cost of the property up to June 1st, 1899. If the evidence as to the cost of the property, at that time, be excluded, we still have proof, competent and uncontradicted, made strictly in accordance with the rule above stated. No evidence was offered, by the defendant in error, as to the value of the property. The case rests, upon that issue, upon the uncontradicted testimony of the auditor of the railroad company, showing the amount of outstanding stock and bonds, and the cost of the property up to June 1st, 1899.

XX.

Questions, as to the reasonableness of the dividends paid, and comparison of rates, are, in this case, incidental. The propositions upon which the plaintiff in error, confidently, relies for a judgment of reversal, are as follows:

A carrier has the absolute right to receive compensation for services rendered, equal, at least, to the actual, reasonable, cost of the service required and rendered.

The fact that the total earnings of an interstate railroad exceed the cost of transporting all traffic, furnishes no reason for requiring business, local to the State, to be done under a tariff which fails to afford a revenue equal to the actual, reasonable, cost of the service rendered. Earnings on interstate business cannot be considered, in fixing the cost of transportation, local to the State.

A State has not the power to arbitrarily establish a rate for transporting a single, specified commodity, between certain designated stations. Its authority is limited to the establishment, and enforcement, of reasonable rates, uniform, in application and operation, upon the entire railroad; if not to all railroads within the State.

The State cannot compel a carrier to accept a compensation less than its reasonable local rate, by reason of the fact that the shipment originates upon, or is destined to a point upon the line of another railroad; the service rendered being identical. If the local rate is reasonable, it is not made unreasonable because the traffic originated upon the road of another carrier.

A State cannot compel a carrier to transport a commodity, received from a connecting carrier, at a less, or different rate, than the rate it is permitted to collect from its own direct patrons, for identical service, rendered in transporting the same commodity, between the same points.

In estimating the cost of transportation, the carrier may include interest upon its bonded indebtedness, and a reasonable dividend.

The fact that a carrier has been able to pay a dividend, from earnings upon business not local to the State, furnishes neither reason or justification for a local tariff, under which earnings upon local business are insufficient to defray the actual cost of doing the business.

A State cannot establish a through joint rate, over the lines of independent carriers, against the objection of such carriers.

A State cannot apportion, or divide, joint earnings, between carriers. Such action is judicial, and beyond the authority of the commission.

A State cannot compel two or more carriers to accept a joint rate, less than the sum of their respective reasonable local rates, for identical service.

I respectfully ask for a reversal of the judgment of the State Court.

ALBERT E. CLARKE.

No. 131.

Supreme Court of the United States

October Term, 1900.

FILED
DEC 17 1900
JAMES H. MCKENNEY,
CLERK.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, EX REL. THE RAILROAD AND WAREHOUSE COMMISSION, DEFENDANT IN ERROR.

In Error to the Supreme Court of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

W. B. DOUGLAS,
Attorney General, Minnesota.

THOS. D. O'BRIEN,
IRA B. MILLS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

NO. 381.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

Plaintiff in Error,

vs.

STATE OF MINNESOTA ex. rel THE RAILROAD AND WAREHOUSE COMMISSION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The St. Paul & Duluth Railroad Company, now controlled and owned by the Northern Pacific Railway Company, operates a line of railroad from Duluth, Minnesota, to the City of St. Paul and the City of Minneapolis, in the State of Minnesota.

The Minneapolis & St. Louis Railroad Company operates a line of road from the cities of St. Paul and Minneapolis to the various points in the State of Minnesota described in the order of the Railroad and Warehouse Commission, which is under consideration in this case.

Both of the defendants are fully equipped to conduct the business of common carriers of freight, have complete track connections and transfer facilities at the cities of St. Paul and Minneapolis, and for a long time prior to the making of the order complained of, had been engaged in transporting hard coal in car load lots without change of cars from Duluth to the points upon the line of the Minneapolis & St. Louis Railroad named, for a joint through rate which had been established by the mutual agreement of said companies, and which had been divided between the companies according to that agreement.

On the 22nd day of September, 1898, the Railroad and Warehouse Commission of the State of Minnesota, under the resolution, Exhibit A, page 16 of Record, entered upon the investigation of the reasonableness of said joint rate for hard coal in car load lots so maintained by said companies. The railway companies duly appeared and took part in the investigation, and on the 19th day of January, 1899, the Commission made the order, Exhibit B, Record page 18, of which Schedules A and B, pages 18 and 19 are a part, Schedule A being the joint through rate which had been established and maintained by the mutual agreement of the railway companies, and Schedule B the rate determined upon by the Commission. The order was duly published and served as required by the laws of Minnesota, but the railway companies failed to agree upon a division of the rate ordered by the Commission, and the plaintiff in error, the Minneapolis & St. Louis Railroad Company, withdrew all tariffs on hard coal in car load lots which had been established by the agreement of said companies. The Commission having duly cited the companies to appear, made the order of April 8th, 1899, directing how the joint through rate which it had established should be divided between the companies. Exhibit C, Record page 20. The orders of the Commission were duly promulgated and published as provided by law.

Neither of the companies filed or posted schedules of the new tariff, as required by the laws of Minnesota, and the plaintiff in error refused to receive or transport coal under the order of the Commission, and thereupon proceedings were commenced in the District Court of Ramsey County, Minne-

sota, to compel the railway companies to comply with the order of the Commission. After trial, judgment was rendered by that court confirming the orders of the Commission and directing the issuance of a peremptory writ of mandamus as prayed for in the petition, and the judgment so entered was affirmed on appeal by the supreme court of Minnesota in State ex rel. vs. The Minneapolis & St. Louis Railway Company, 80 Minn. 191.

ARGUMENT.

If we correctly understand the contention of the plaintiff in error, it is that the judgment of the supreme court of Minnesota is erroneous for two reasons:

First:—That Chapter 91, laws of Minnesota 1895, which confers upon the Railroad and Warehouse Commission of Minnesota the right to compel connecting railroads to establish joint through rates between points within this State, is invalid in that it authorizes an unwarranted interference by the State in the management of railways; and

Second:—That the rate established does not afford sufficient compensation to the carrier within the decisions of this court.

The assignments of error, we think, amount to the two propositions we have stated, most of them being repetitions of the same claim in somewhat different language.

I.

CHAPTER 91, LAWS OF MINNESOTA, 1895, VIOLATES NO PROVISIONS OF THE STATE OR FEDERAL CONSTITUTION, AND UNDER IT THE RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA HAS THE POWER TO COMPEL THE ESTABLISHMENT AND ACCEPTANCE OF JOINT THROUGH RATES BETWEEN POINTS WITHIN THE STATE BY CONNECTING CARRIERS.

The decisions of this court cited in the brief of counsel for the appellant fully establish the rule contended for by the State, and while it is perhaps impossible to frame any general statement which will cover all cases, we think we are within the scope of all the decisions of our courts upon this

question, both State and Federal, when we say that a railroad corporation and public carrier being an entity, the private property of which has been invested in a public enterprise with the permission of the State and fulfilling a governmental duty or at least power, i. e., the maintenance of a public highway, has the right to receive fair compensation for its services and a fair return upon the capital so invested, and has the right ordinarily to manage its own affairs in its own manner, but with this important limitation,—that where such carrier attempts to unnecessarily increase the cost of the services it renders, or where it, for no apparent good reason, refuses to take proper steps to lessen the cost of the services rendered, the State has the right to interfere with what might be called the private management of the carrier, to an extent sufficient to remedy the abuse; and that it is not only the right but the duty of the State to so regulate the rates, charges and methods of the carrier that for such reasonable compensation the public shall have a safe, efficient and economical service.

Munn vs. Illinois, 94 U. S. 113;
Peik vs. Railroad Company, 94 U. S. 164;
Dowe vs. Beidelman, 125 U. S. 680;
State vs. Farmers' Loan and Trust Co., 116 U. S. 307;
Smythe vs. Ames, 169 U. S. 466; on reargument, 171 U. S. 364;
Railway Company vs. Minnesota, 134 U. S. 418;
Steenerson vs. Railway Company, 69 Minn. 370.

The State has the right to regulate and control the use of private property which has been clothed with a public interest. The only question which arises in this case is to what extent may such control be exercised.

The carrier has undoubtedly the right to manage its own affairs without interference from the State in all matters which are properly private or which affect only its stockholders; those being matters in which the public has no concern, and the relative rights of the stockholders, the officers and corporation can be determined between themselves; but if a carrier deliberately increases the cost of the service it renders to the public, or if it refuses to adopt methods which are obviously expedient and proper, and which will result in

lessening the cost of the service, the State has the right to insist that an economical method shall be adopted, and obviously so when such method is entirely feasible and the usual and ordinary method adopted by railways similarly situated.

Unless this is true, the right of the State to regulate charges is of no efficacy; for when it is considered that the carrier has a right to fair and reasonable compensation for the services, and after the payment of its expenses, to at least some return upon the capital invested, it is apparent that if the management, method of operation, propriety of the various expenses incurred, is beyond State control, the regulation of charges must necessarily be also.

The contrary, however, is the rule, and the authorities cited by counsel for the plaintiff in error, as well as those referred to in this brief, fully establish the rule we contend for,—that the State has the right, within proper limitations, to interfere in and direct methods of operation.

As was said in Smythe vs. Ames, supra, at page 544, "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders."

If, on a hearing to fix rates, it was shown that the operating expenses were doubled by evident reckless or bad management, the amount so expended would not be accepted as a fair basis upon which to estimate rates, nor would interest paid upon a fraudulent bond issue be considered a legitimate expense; neither would a railroad company be held to have the right to earn dividends upon capitalization shown to be fictitious or grossly excessive. And this is true because the railroad would not be permitted to improperly increase the necessary expenses of conducting the enterprise or to demand from the public earnings upon fictitious capital. What the State can do indirectly it can do directly; and

when connecting carriers are found whose lines constitute a continuous highway for the carrying of a commodity which is necessary to the public and in which the public is deeply interested, it is the duty of both to adjust matters under all the circumstances of the case so as to give the public reasonable service for reasonable compensation.

That joint through rates are advantageous, convenient and economical is proved by the fact that joint traffic arrangements are universally made, and joint through rates universally established. It is only when the public asks to share in the benefits of the situation and the circumstances of the haul that the claim of unwarranted interference is made.

If coal can be carried in car load lots more cheaply, more expeditiously, more conveniently to the public, by joint traffic agreements without change of cars, the State has the right to require that to be done. The duty of the carrier is to serve the public, not to hamper it. It is entitled to a fair compensation for its necessary services under the actual existing conditions and with proper management, and not under expensive conditions which the carrier chooses to create.

The evidence shows that the location of the Duluth road and the Minneapolis & St. Louis road, their track connections, transfer facilities, equipment, etc., are such that by operating together under joint traffic agreements, the cost of the service can be greatly lessened. It is difficult to understand upon what theory the plaintiff in error claims that it has the right to refuse to take advantage of conditions as they actually exist, and to insist that it may, if it so chooses, make the service unnecessarily expensive to the public.

We submit that it is the duty of the common carrier to take advantage of every favorable condition, so as to give the public the benefit of just as economical a service as is possible, and where it refuses so to do, the State has the right, by proper legislative enactment, to compel it.

Mayor, etc., vs. Northwestern Ry., 109 Mass. 112.

If it is conceded, as we think it must be, that the evidence shows that the cost of the service would be less if performed as ordered by the commission, and that no objection to such

method is urged except that the orders constitute an attempt to improperly interfere with the management of the railroad, the question is squarely presented whether or not a common carrier has the right at its pleasure to increase the cost of a service which it renders to the public. If this contention of the plaintiff in error can be maintained, it is idle for the State to attempt to regulate charges. For if it is to have any voice in the establishment of reasonable rates, it must have the power of regulation in some degree and in some manner in the business of the carrier. And it is difficult to see where a stronger case demanding state regulation could be found than the case at bar.

Since the rendition of the judgment in this case by the Supreme Court of Minnesota, this court has, we think, disposed of the contention of counsel for plaintiff in error upon this branch of the case:

> Wisconsin, Minnesota & Pacific Railroad vs. Jacobson, 179 U. S. 287.

The particular question involved here, it is true, did not arise in that case. The same enactment of the Legislature of Minnesota was, however, under consideration, and while this court did not consider any of the provisions of that act which were not involved in the case directly before it, it is submitted that the decision is decisive of this branch of the present case. Mr. Justice Peckham says, at page 296: "At common law the courts would be without power to make such an order as was made in this case by the State court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind. If power were granted by the legislature, and it amounted in the particular case to a fair, reasonable and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it. Atchison, etc., Railroad Company vs. Denver, etc., Railroad Company, 110 U. S. 667, 681; People ex rel., etc., vs. Boston & Albany Railroad Company, 70 N. Y. 569; People vs. Railroad Company, 104 N. Y. 58." And again: "Railroads have

from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. Olcott vs. Supervisors, 16 Wall. 678; Cherokee Nation vs. Southern Kansas Railway Company, 135 U. S. 641; United States vs. Joint Traffic Association 171 id. 505; Lake Shore Railway Company vs. Ohio, 173 id. 285, 301."

In the case of Louisville & Nashville Railroad Co. vs. Kentucky, 161 U. S. 677, Mr. Justice Brown, speaking of the right of the State to regulate within proper limitations, corporations of this character, after reviewing a multitude of decisions, says, at page 700: "These cases, however, do not infringe upon the general principle, so frequently declared, that where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained wherever it can be done without the impairment of vested rights. Notwithstanding these cases, the general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."

As was said by this Court in Wisconsin, etc., vs. Jacobson, supra: "The only question arising as each case comes up for decision is whether in the particular case the power has been duly exercised."

When it is remembered that the two railway companies who are parties to this agreement had actually entered into a joint traffic agreement and had established joint through rates and had made complete track connections so that they were fully equipped to conduct business in that manner, and that the only demand made by the State, in this proceeding, at

least, is that they will continue the carriage of hard coal in car load lots, but charge therefor no more than the service is reasonably worth, it is apparent how far-fetched is the claim that the State is attempting to improperly interfere in the business of the carrier.

The State has the right to regulate rates in all cases where the carriers and the freight are subject to its jurisdiction. The fact that more than one carrier is engaged in rendering the service cannot of itself deprive the State of this right to regulate, and yet that is what the contention of the plaintiff in error amounts to.

As we will show hereafter, the establishment of a joint through rate, which is less than the sum of the two locals, is not discrimination. Counsel for the plaintiff in error claims that it is, and for that reason the orders of the Commission are void. If this contention were true, the joint rates previously established by agreement between the companies constituted discrimination. But it is claimed that the joint rate so established was beyond the regulation of the State; therefore, by the making of an agreement which was unlawful, because it discriminated between different classes of shippers, the railway companies have secured themselves from interference by the State.

Absurd as this argument is, it has, we submit, as much force as the claim made by the plaintiff in error, that the act of the Legislature and the order of the Commission compel unlawful discrimination, because under them the plaintiff in error is compelled to carry freight originating upon the line of the St. Paul & Duluth Railroad Company upon different terms than freight of the same class originating upon its own or other lines.

The freight affected by the judgment here under consideration is only hard coal in car load lots. When it originates upon the line of the St. Paul & Duluth Railroad Company and is delivered at St. Paul or Minneapolis to the Minneapolis & St. Louis Railway Company, it constitutes freight of a particular class, and the public are each and all entitled to have that freight carried at the rate established, and the benefits of the reduced rate are therefore open to all without discrimination. The discrimination is in the class or character

of the freight carried, and that it can be carried profitably at the rate provided for in the order of the Commission, will, we think, be established in another portion of this brief.

The contention of the plaintiff in error, that the provisions of Chapter 91 of the laws of Minnesota, 1895, are in violation of the charter rights of the plaintiff in error, is not sustained by the authorities cited in counsel's brief. Those decisions are to the effect that in the absence of statutory regulations the courts cannot compel connecting carriers to enter into joint traffic agreements, and that the making of such a regulation is a legislative and not a judicial act.

The decision by Mr. Justice Caldwell in Little Rock & M. R. Co. vs. St. Louis, I. M. & S. Ry. Co. et al., 41 Fed. 559, was based upon the decision of this Court in the Express Cases. 117 U. S. 1; and the following language of this Court, found upon page 29, was quoted by Justice Caldwell: "'In this way, as it seems to us, the Court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves,' and that, we said in Atchison, T. & S. F. R. Co. vs. Denver & N. O. R. Co., 110 U. S. 667, followed at this term in Pullman's Palace Car Co. vs. Missouri Pac. Ry. Co., 115 U. S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

In the Express Cases, supra, Mr. Justice Field, in dissenting, uses the following language, page 34: "But I am clear that railroad companies are bound as common carriers to accommodate the public in transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience."

It is not necessary in this case to determine what would be the result if the State were attempting to impose a new and different method of business upon the carriers. Here the State simply accepted the method which had already been adopted by the carriers and fixed their charges for such services under the circumstances and conditions and methods of carrying on the business as they existed.

The real question, therefore, in this case is, Have the carriers the right to increase the cost of the service and render it more expensive than necessary? For it is not pretended that if they were permitted to fix their own charges they would not, as a matter of economy, continue to adopt the method now insisted upon by the State. The rates fixed, provide, as we claim, adequate compensation for the services to be rendered. If this is true, it makes no difference whether part of those services consists in transferring of cars or in loading or unloading the merchandise at the connecting point. The services can be profitably rendered at the rate fixed by the Commission. If tne carriers see fit to increase the cost to themselves by unnecessarily handling the freight carried, that is a matter for which the public is not responsible, nor should it be compelled to pay for unnecessary service.

Counsel is in error when it is claimed that the order discriminates between local and through rates. The order under consideration does not approve or disapprove of the local rates maintained by the carriers. It deals exclusively with the through rate; and in the division of the rate there is allowed to the plaintiff in error an amount per ton per mile much greater than the local rate upon the Duluth railroad, which counsel erroneously states was approved of by the Commission. The adoption of that rate by the Commission as a basis for calculating through rates does not constitute an approval of it. And as no appeal has been taken by the St. Paul and Duluth Railroad the plaintiff in error will not be heard to complain that the joint rate established and the division made is unfair as to the Duluth road.

It is true that it has been held that the Interstate Commerce Commission has no authority to compel the establishment of joint rates under the Interstate Commerce Act, and that such right does not exist at common law. That is not the question here; here the right is given by the statute, and the question is as to the validity of the act of the Legislature.

The Interstate Commerce Act contains a provision that where connecting carriers voluntarily enter into joint traffic arrangements, that such joint rate must be reasonable. These

provisions give the Interstate Commerce Commission jurisdiction as to such joint rates.

Railroad vs. Interstate Commerce Commission, 162 U. S. 184.

It is difficult to see any difference in principle between this and compelling two carriers subject to State control to enter into such agreement. Every objection that can be urged in one case can be urged with equal force in the other. If Congress has the right to give the Interstate Commerce Commission jurisdiction over joint rates voluntarily established, it has also the right to compel the establishment of such rates in a proper case, and we have no doubt that if the act of Congress contained such a provision it would have been sustained.

This case comes directly within the decision last quoted, as the joint rate had been established between the carrier and was in force at the time the commission entered upon its investigation.

The claim by the apellant or plaintiff in error that a joint rate which is less than the sum of the two local rates constitutes discrimination is disposed of by the case of

Railway Company vs. Olson, 10 U. S. App. 430.

In that case Olson sued to recover for claimed excess freight paid by him, basing his claim upon the ground that the railroad was carrying through freight for less than the price charged for local freight. It was held that that fact did not constitute unjust discrimination; also that a joint through rate might be less than the sum of the local rates.

II.

THE RAILROAD AND WAREHOUSE COMMISSION AND THE DISTRICT AND SUPREME COURTS OF MINNESOTA HAVE FULL JURISDICTION IN THE PREMISES, ALL THE REAL PARTIES IN INTEREST HAVING BEEN DULY MADE PARTIES.

In the 14th subdivision of the brief of counsel for plaintiff in error it is argued that the order of the Commission fixed rates over two roads, i. e., the Minneapolis, New Ulm & South-

western Railroad and the Wisconsin, Minnesota & Pacific Railroad, without having made those companies parties to the proceeding.

The first named, counsel admits, is owned and operated by the plaintiff in error, but claims the latter "is wholly independent." This statement, as to the present condition of those railroads is evidently a mistake, as the answer interposed by plaintiff in error in the district court to the alternative writ contains the following allegation, page 31, Record: "The Minneapolis & St. Louis Railroad Company is a common carrier operating a line of railroad from Minneapolis, Minnesota, to Angus, Iowa; it also owns and operates a line of railroad extending from Hopkins, Minnesota, on its first named line westerly through the State of Minnesota to Watertown, South Dakota. It owns and operates a branch line from Winthrop, on said last named line, to New Ulm, Minnesota. Said branch line was, prior to June 1st, 1899, owned by the Minneapolis, New Ulm & Southwestern Railroad Company, all the capital stock of which last named company was owned by this defendent. Said The Minneapolis & St. Louis Railroad Company has connections and traffic arrangements with other lines of railroad by which it has access to New York, Chicago and all the business centers of the United States, and is engaged in both interstate and local traffic."

Mr. Nay testified, on the hearing, that the Minneapolis & St. Louis Railroad Company began to treat the Minneapolis, New Ulm & Southwestern as a part of its system March 1st, 1899 (Record, page 47), and that the ownership of the Wisconsin, Minnesota & Pacific was acquired by plainitff in error, February 20th, 1899 (Record, page 51).

We think it is apparent from all the evidence that both of these roads claimed now to be independent have, at least from a period antedating the issuance of the alternative writ, been and still are operated and owned by the plaintiff in error, and constitute a part of its system.

There is no claim that the Commission had not proceeded regularly, and had not acquired full jurisdiction over the plaintiff in error. No objection, therefore, can be taken by the plaintiff in error to the order upon the ground of want of jurisdiction, and the order of the Commission is binding upon

it as to shipments destined from points upon its line even though it acquired the ownership of the road connecting with such points after the making of the order.

But this claim of the plaintiff in error will not be considered for the reason that it is not contained within any of the assignments of error in this court or in the supreme court of Minnesota. The seventh and ninth assignments here, under which this claim is made, have no reference to any defect of parties in the hearing before the Commission or elsewhere.

Deitsch vs. Wiggins, 15 Wall. 539;
Scholey vs. Rees, 23 id. 331.

If there is any force at all in the objection it must be upon the ground that the Commission had not jurisdiction to make the order sought to be enforced, because it had failed to properly bring before it all the carriers to be affected. A carrier not a party to the proceeding would doubtless be heard to raise this objection whenever it was sought to enforce the order, but even in that case the objection would have to be made at the first opportunity, or it would be held to have been waived. No other party would be heard to make the objection at any time unless it appeared that such party's rights were imperiled, and it would then be in the nature of an objection to the proceeding upon the ground of a defect of parties. In the Minnesota practice, a defect of parties, plaintiff or defendant, is a ground of demurrer. General Statutes 1894, section 5232. And unless objection is taken either by demurrer or answer the defendant is deemed to have waived the same. General Statutes 1894, section 5235.

Blakeley vs. La Duc, 22 Minn. 477;
Davis vs. Chouteau, 22 Minn. 548.

III.

THE RATE FIXED BY THE COMMISSION IS REASONABLE, AND THE DIVISION MADE IS FAIR AND JUST.

There is nothing in the contention of the plaintiff in error that the trial court failed to find the facts in favor of the Commission.

Chapter 91, of the laws of Minnesota, 1895, provides, section 3, subdivision C, second paragraph, as follows:

"The rates established by said Commission shall go into effect within ten (10) days after the same are promulgated by said Commission, and from and after that time the schedule of rates so established shall be prima facie evidence in all the courts of this State that such rates are reasonable through rates for transportation of freight and cars upon the railroads for which such schedules shall have been fixed."

And subdivision D, of the same section, provides: " * * * And the division so determined by the Commission shall in all controversies or suits between the railroad companies interested be prima facie evidence of the just and reasonable division of such charges."

The findings of the Commission being prima facie correct, the burden was upon the carrier to prove that the rates fixed were unreasonable.

It must be remembered that the rates so declared to be prima facie correct are those fixed by the Commission after a hearing upon due notice to the carrier, in which all the requirements necessary to constitute due process of law are complied with.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Minnesota, 134 U. S. 418.

The trial court, that is, the district court of Minnesota, found that the plaintiff in error failed to overcome the presumption as to the correctness of the rate fixed by the Commission. The fact that the Court said in its memorandum that the contention of the plaintiff in error might be true, but its evidence failed to show that to be the fact, does not lessen the force of the findings made. It is well settled that the memorandum filed by the Court is no part of its findings, and can neither add to nor take away from their force.

Morrow vs. St. Paul City Railway Company, 65 Minn. 382.

The language used by the Court in its memorandum, however, amounts to a finding that the plaintiff in error had failed to overcome the presumption which exists in favor of the findings of the Commission.

This is not a case where the Court has failed to make findings, and therefore is not within the decision in case of Railway Co. vs. Board of Railway Commissioners, Supreme Court Reports, volume 20, page 236. If the findings of the Court were not sufficiently specific, the proper practice would have been to request additional findings.

Cummings vs. Rogers, 36 Minn. 317;
Opinion of supreme court of Minnesota in this case.

The burden was upon the plaintiff in error in the court below to show by competent evidence that the rate determined was reasonable, and if, as we claim, no evidence was introduced from which it could be determined what was or was not a reasonable rate, it follows, of course, that the judgment of the district court was properly sustained by the supreme court of the State. The mere fact that the plaintiff in error introduced evidence upon some theory of its own, does not entitled it to a decision in its favor; and it was not incumbent upon the State, nor would it have been good practice, for it to introduce evidence when the railway company, upon whom the burden rested, entirely failed to make out a case.

Counsel for the plaintiff in error makes the mistake of constantly stating that claims made by the company were conceded, when, as a matter of fact, they were either ignored, or accepted merely for the purpose of showing that even upon such theory the judgment must be for the State.

The rate fixed by the Commission being presumed to be correct, such presumption must be rebutted and overcome by competent evidence. Evidence of bonded indebtedness and of the amount of the capital stock only is not sufficient, for while it is proper to show the bonded indebtedness, the amount and value of stock, the capital invested in the road, the rate of interest which its bonds bear, and the operating expenses,—the real inquiry is the fair and reasonable value of the property engaged and used in the business of the carrier; and this, together with its operating and other necessary expenses, is taken as the basis upon which rates can be computed.

Dowe vs. Beidelman, 125 U. S. 680;
Smythe vs. Ames, 169 U. S. 466.

In the latter case this court said, at page 544: "But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders."

It is apparent that no evidence was introduced by the plaintiff in error which would justify the trial court in reversing the findings of the Commission, and it became the duty of that court to find, as it did, that the rates established were fair and reasonable. It was in the power of the plaintiff in error, had it seen fit, to introduce evidence in accordance with the decisions of this Court, but it evidently preferred not to.

IV.

THE TESTIMONY NOT ONLY FAILS TO OVERCOME THE PRESUMPTION IN FAVOR OF THE FINDINGS OF THE COMMISSION, BUT, WE SUBMIT, DEMONSTRATES THAT THE RATES ESTABLISHED BY THE COMMISSION ARE LIBERAL, AT LEAST AS TO THE PLAINTIFF IN ERROR.

The rate is made upon hard coal in car load lots only. It is important that this be borne in mind, for if we understand counsel's position, it is that the carrier would be compelled to perform the service at a loss if the rate fixed by the Commission were maintained. It may be conceded, as a general proposition, that carrying local freight hauled for short distances and in broken or small lots, requiring considerable handling, care, etc., is more expensive per ton per mile than what is designated "through freight." But this does not mean interstate business. There is no expense or economy attached to crossing a state line. A distribution of freight in small quantities to intermediate points from a station fifty miles east to a station fifty miles west of the line dividing Minnesota and Dakota would be just as expensive as though the whole line were in either state. The character of the commodity and the method of handling it are the chief considerations.

Mr. Hopkins, the general freight agent of the plaintiff in error, explained this with great fairness in his testimony. The first great classification is in car lots and less than car lots (page 80, Record). Then come various other considerations, such as value, the perishable quality of the goods, the size and shape of the package, the work of handling, etc., (pages 87-92, Record). The fact being that coal is placed in one of the lowest classes, that is Class D (page 91, Record), and only such articles as sand, bricks, hay and salt can be classed lower. This shows that whatever may be said as to through or local freight in general, coal in car load lots, whether through or local, can be transported for the minimum rate, and particularly is this true of the coal subject to the rate fixed by the Commission, it being delivered on cars to the Minneapolis & St. Louis Railway Company upon their tracks at Minneapolis. (Hopkins' testimony, page 89.)

We shall, therefore, for the purpose of this argument, disregard the comparison which Mr. Hopkins makes (page 75) between the cost of handling through and local freight, and consider the reasonableness of the rate in view of the general earnings of the road, and the average cost of carrying freight, according to the statements made by Mr. Nay.

Mr. Nay, the auditor of plaintiff in error, testified to the earnings of the Minneapolis & St. Louis Railroad Company, freight and passenger, for the fiscal year ending June 30th, 1899, as well as the operating expenses for the same year. And the computations made by Mr. Yapp, offered in evidence by the State, were based upon the statements furnished by Mr. Nay.

Mr. Nay's estimate as to the cost of carrying freight must be rejected, as he includes in the cost interest upon the bonded debt and dividends upon stock (Record, page 60 et seq.). Counsel seems to misunderstand our position in this matter. We claim that the evidence sustains the findings of the Commission, conceding that the carrier has a right to earn sufficient to pay its operating expenses, interest upon its bonds and reasonable dividends upon its stock,—that is, reasonable dividends in view of all the circumstances of the case; but we also insist that interest upon bonded indebtedness and dividends are not part of operating expenses, nor should they be so de-

scribed, and that it is misleading and confusing to include those items under the head of operating expenses.

Mr. Yapp, the witness for the State, made certain computations, and prepared the tables hereafter referred to, as we have said, from the testimony of Mr. Nay. He properly confined operating expenses to such items as are properly so termed, but included under that term taxes and rentals paid by the carrier. The tables prepared by Mr. Yapp and received in evidence are as follows:

EXHIBIT 1.

STATEMENT showing COST OF OPERATION, GROSS EARNINGS, and AVERAGE COST OF OPERATION PER TON PER MILE, for YEAR ENDING JUNE 30th, 1899, taken from FIGURES FURNISHED by the MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY.

	ST. PAUL DIV'N	WESTERN DIV'N	PACIFIC DIV'N	NEW ULM DIV'N	ALBERT LEA DIV'N	SOUTHERN DIV'N	TOTALS
Operating Expenses	$ 92,650.53	$219,266.13	$153,728.99	$29,384.87	$ 708,395.33	$350,882.85	$1,554,308.70
Taxes paid	1,813.23	19,120.82	10,318.75	399.77	38,448.30	22,043.14	92,144.01
Rentals paid	54,254.18				1,440.00		55,694.18
Total operating expenses	$148,717.94	$238,386.95	$164,047.74	$29,784.64	$ 748,283.63	$372,925.99	$1,702,146.89
DEDUCT							
Trackage and Rentals rec'd	13,099.80				135,488.55	3,120.00	151,708.35
NET COST	$135,618.14	$238,386.95	$164,047.74	$29,784.64	$ 612,795.08	$369,805.99	$1,550,438.54
Gross Earnings	$ 57,351.42	$603,554.72	$264,921.44	$33,884.10	$1,219,163.70	$532,469.51	$2,711,344.89
Freight Earnings	41,310.22	475,771.83	203,006.92	21,715.19	906,939.68	376,755.98	2,025,499.82
Per ct. of frt. to gross earnings	72.03%	78.83%	76.63%	64.09%	74.39%	70.76%	Av. 74.70%
Proportion of cost of operating charge to freight	$ 97,685.75	$187,920.43	$125,709.78	$19,088.97	$ 455,858.26	$261,674.72	$1,158,177.59
Total Tons one mile	1,941,846	26,901,460	9,414,681	675,831	89,524,755	34,797,490	163,256,063
Average cost per ton per mile	5.031	.6986	1.335	2.825	.5092	.7520	.7094

YEARS	1890	1891	1892	1893	1894	1895	1896	1897	1898	1899
Estimated cost per ton per mile in Minnesota	.684	.671	.695	.680	.....	.....	Not shown	.....	.....	.....
" " " " " " whole line	.727	.743	.736	.709	.....	.....	Not shown	.....	.....	.....
Average rec'pts " " " " in Minnesota	1.338	1.398	1.492	1.313	1.233	1.338	1.315	1.303	1.194	1.220
" " " " " " whole line	1.430	1.406	1.486	1.330	1.267	1.332	1.328	1.283	1.171	1.190

New Ulm Rate Case, Sept. 21st, 1899.

EXHIBIT 2.

STATEMENT showing COST OF OPERATION, GROSS EARNINGS, and AVERAGE COST OF OPERATION PER TON PER MILE for YEAR ENDING JUNE 30TH, 1899, taken from FIGURES FURNISHED by the MINNEAPOLIS AND ST. LOUIS R. R. COMPANY.

	WESTERN DIVISION	PACIFIC DIVISION	NEW ULM DIVISION	TOTALS
Operating Expenses	$219,266.13	$153,728.99	$29,384.87	$402,379.99
Taxes Paid	19,120.82	10,318.75	399.77	29,839.34
Rentals Paid				
Total Operating Expenses	$238,386.95	$164,047.74	$29,784.64	$432,219.33
Gross Earnings	$603,554.72	$264,921.44	$33,884.10	$902.360.26
Freight Earnings	475,771.83	203,006.92	21,715.19	700,493.94
Per Cent of Freight to Gross Earnings	78.83%	76.63%	64.09%	Avg. 77.63%
Proportion of Cost of Operation Chargeable to Freight	$187,920.43	$125,709.78	$19,088.97	$335,531.86
Total Tons One Mile	26,901,460	9,414,681	675,831	36,991,972
Average Cost per Ton per Mile	.6986	1.335	2.825	.907

EXHIBIT 3.

STATEMENT showing MILEAGE, RATES and RATES PER TON PER MILE, BASED ON RATES made by R. R. & W. H. COMMISSION IN NEW ULM.

COAL RATE CASE.

FROM DULUTH TO	MILEAGE FROM		RATES PER TON 2000 LBS. FROM DULUTH		M. & ST. L. PROPORTION	
	DULUTH	M'PLS	Old Rate	Comm.s' Rate	Rate per Ton	Rate per ton per mile
			$	$	$	Cts.
Hopkins	171	9	1.75	1.32	.32	3.556
Minnetonka M	174	12	2.00	1.35	.35	2.917
Deephaven	177	15	2.00	1.38	.38	2.533
Excelsior	181	19	2.10	1.40	.40	2.105
Waconia	194	32	2.35	1.51	.51	1.594
Young America	201	39	2.45	1.56	.56	1.436
Norwood	202	40	2.50	1.57	.57	1.425
Hamburg	206	44	2.50	1.62	.62	1.410
Green Isle	210	48	2.50	1.63	.63	1.313
Arlington	217	55	2.50	1.68	.68	1.236
Gaylord	226	63	2.50	1.75	.75	1.190
Winthrop	232	70	2.50	1.80	.80	1.143
Lafayette	239	77	2.50	1.86	.86	1.117
Klossner	246	83	2.50	1.91	.91	1.096
New Ulm	251	89	2.50	1.95	.95	1.067
Gibbon	240	78	2.50	1.87	.87	1.115
Fairfax	249	87	2.50	1.96	.96	1.105
Franklin	257	95	2.50	2.01	1.01	1.063
Morton	263	101	2.50	2.05	1.05	1.040
Redwood	269	107	2.50	2.11	1.11	1.037
Delhi	275	113	2.50	2.15	1.15	1.018
Belview	280	118	2.50	2.21	1.21	1.025
Echo	285	123	2.50	2.23	1.23	1.000
Wood Lake	292	130	2.50	2.29	1.29	.992
Hanley Falls	297	135	2.50	2.33	1.33	.985
Hazel Run	303	141	2.50	2.38	1.38	.979
Clarkfield	308	146	2.50	2.42	1.42	.980
Boyd	316	153	2.50	2.48	1.48	.967
		2222			2478	

M. & ST. L. AVERAGE RATE PER TON PER MILE, 1.115 CENTS.

EXHIBIT 4.

STATEMENT showing TOTAL number of TONS of HARD COAL RECEIVED from DULUTH for YEAR ending JUNE 30TH, 1899; M. & ST. L. R. R. PROPORTION of REVENUE and AVERAGE RATE PER TON PER MILE; also LOSS OF REVENUE, had COMMISSIONERS' RATES been in effect.

FROM DULUTH TO	MILES FROM MPLS.	TONS CARRIED	M.&ST.L. PROP'N OF RATE PER TON	TONS ONE MILE	REVENUE	RATE PER TON PER MILE
			$		$	Cts.
Green Isle	48	20	.63	960	12.60	1.312
Gaylord	63	99	.75	6,237	74.25	1.190
Winthrop	70	642	.80	44,940	513.60	1.143
Lafayette	77	15	.86	1,155	12.90	1.117
New Ulm	89	1154	.95	102,706	1,096.30	1.067
Gibbon	78	27.5	.87	2,145	23.93	1.115
Fairfax	87	218	.96	18,966	209.28	1.103
Franklin	95	31	1.01	2,945	31.31	1.063
Morton	101	71	1.05	7,171	74.55	1.040
Redwood	107	15	1.11	1,605	16.65	1.037
Echo	123	51	1.23	6,273	62.73	1.000
Wood Lake	130	47.5	1.29	6,175	61 28	.993
Hazel Run	141	18	1.38	2,538	24.84	.979
Clarkfield.	146	116	1.42	16,936	164 72	.973
Boyd	153	58	1.48	8,874	85.84	.967
					$	Cts.
Totals		2583		229,626	2,464.78	1.073 Av.

TOTAL TONS of HARD COAL received from DULUTH for YEAR ending JUNE 30TH, 1899, . . 2,583 tons.

M. & ST. L. R. R. proporton ON OLD RATE, 2,583 tons @ $1.50, ... $3,874.50

Had COMMISSIONERS' RATES been in effect for SAME PERIOD, M. & ST. L. R. R., PROPORTION WOULD BE, ... $2,464.78

LOSS OF REVENUE TO M. & ST. L. R. R. for year $1,409.72

EXHIBIT 5

STATEMENT showing MILEAGE RATES and RATES PER TON PER MILE on HARD COAL from DULUTH to STATIONS on GREAT NORTHERN and NORTHERN PACIFIC RY'S.

GREAT NORTHERN RY.				NORTHERN PACIFIC RY.			
TO	MILES	RATE PER TON	RATE PER TON PER MILE	TO	MILES	RATE PER TON	RATE PER TON PER MILE
Nickerson.....	33	1.25	3.787	Sawyer.....	38	.80	2.105
Kerrick	40	"	3.125	Corona	44	.90	2.045
Bruno	48	"	2.604	Cromwell....	50	.95	1.900
Partridge.....	56	"	2.232	Wright	56	1.00	1.786
Sandstone	63	"	1.984	Tomahawk...	62	1.10	1.774
Brook Park...	80	"	1.562	McGregor ...	71	1.20	1.690
Mora.....	91	"	1.374	Kimberley...	81	1.20	1.481
Tosca	106	"	1.179	Rossburg....	85	1.25	1.471
Milaca.....	111	"	1.126	Aitkin.....	91	1.25	1.374
Bridgman	114	1.60	1.403	Cedar Lake..	96	1.30	1.354
Oak Park.....	120	"	1.333	Deerwood....	101	1.40	1.386
Foley	125	"	1.280	Jonesville ...	111	1.45	1.306
St. Cloud	139	"	1.151	Brainerd.....	118	1.50	1.271
Collegeville...	149	2.00	1.342	Baxter.....	123	1.55	1.260
Avon.	155	"	1.290	Sylvan Lake.	128	1.60	1.250
Albany	161	"	1.242	Pillager	132	1.65	1.250
Freeport	167	"	1.197	Motley	140	1.75	1.250
Melrose	173	"	1.156	Staples.....	148	1.85	1.250
Sauk Centre ..	181	"	1.104	Downer Lake	150	1.85	1.233
West Union...	189	"	1.058	Aldrich.....	155	1.90	1.226
Osakis.....	195	"	1.026	Verndale	159	1.95	1.226
Nelson.....	201	"	.995	Wadena.....	165	2.00	1.212
Alexandria....	206	"	.971	New Y'k Mills	178	2.15	1.208
Brandon.....	219	"	.913	Perham	189	2.25	1.190
Evansville....	224	2.05	.915	Luce	194	"	1.160
Melby	228	2.10	.921	Frazee.....	200	"	1.125
Ashby.....	233	2.15	.923	McHugh	205	"	1.098
Parkdale.....	247	2.25	.911	Detroit	210	"	1.071
Fergus Falls..	252	"	.893	Audubon	217	"	1.037
Carlisle.....	260	"	.865	Lake Park ..	222	"	1.014
Rothsay	268	"	.839	Winnipeg Jct.	230	"	.978
Lawndale.....	275	"	.818	Hitterdal	236	"	.953
Barnesville....	282	"	.798	Syre.....	259	"	.900
Downer.....	290	"	.776	Gary.....	264	"	.852
Glyndon	300	"	.750	Fertile.....	276	"	.815
Averill.....	306	"	.735	Tilden.....	287	"	.784
Felton..... ..	314	"	.717	Red Lake F'lls	310	"	.726
	6601	68.45	1.037 Avg.		5772	65.05	1.127 Avg.

Mr. Yapp's computations show the following:

	Cents.
Average rate per ton per mile at Commission's rate, Exhibit 3	1.115
Average cost per ton per mile on whole system, Exhibit 1	.7094
Average cost on Western Pacific & New Ulm, per ton per mile, Exhibit 2	.907

That is, that the rate allowed by the Commission for handling coal in car load lots, received on through shipments from Duluth, is nearly thirty per cent above the average cost of carrying freight on the whole system, and nearly twenty per cent above the cost upon the three divisions affected by the order. A rate which allows from twenty to thirty per cent of gross income as profit cannot be claimed to be unreasonable.

The false basis on which Mr. Nay estimates the cost of carrying freight is further shown in the table shown at Exhibit 1, in which the cost for several years past is taken from the annual reports made by the plaintiff in error, in none of which the cost approaches the amount now claimed.

According to the report of the Minneapolis & St. Louis Railway Company for the fiscal year ending June 30th, 1899, the actual receipts per ton per mile for freight carried by that road were as follows:

	Cents.
In Minnesota, Exhibit 1	1.220
On entire system, Exhibit 1	1.190
As we have said, the Commission's rate for hard coal in car load lots was	1.115
While the old rate charged for this service was	1.784

The actual earnings for the carriage of freight during the year were	$1,860,257.57
If the rate fixed by the Commission for hard coal, to-wit, 1.115 cents, were applied to all classes of freight, it would have yielded a revenue of	1,743,632.68
Or a total reduction in revenue of	$116,624.89

If, however, the former rate on hard coal, charged by the Minneapolis & St. Louis Ry. Co., were applied to all the freight carried, the total earnings for freight would have been...	2,789,812.29
The actual earnings were	1,860,257.57
The increase would have been	$929,554.72

The contention of the respondent is that the old rate was fair and reasonable, and yet we find that if that rate were adopted as an average rate, the freight earnings of the road would have been increased about fifty per cent.

This showing cannot be disputed, and it absolutely disposes of the contention that the old rate was just or reasonable, because it shows that the rate fixed for hard coal must have been far above the average rate, although the classification of the article, to-wit, Class D, is far below the average.

There is, however, another method of testing the reasonableness of the rate fixed by the commission. At page 66, Record, Mr. Nay places the average cost per ton per mile of carrying freight at 1.112 cents. In the net cost Mr. Nay includes operating expenses, taxes, interest and dividends, and, so far as can be seen, every expenditure or disbursement made. This must be so, for at page 46 he places the total expenditures at $2,237,939.27

While at page 66 he says the net cost was..... 2,335,925.65

Thus making the net cost greater than the total expenditures by $97,986.38

Then, by dividing the proportion of this, which is chargeable to freight, by the number of tons carried one mile, he arrives at what he designates the average cost, to-wit, 1.112 cents. The average receipts per ton per mile on the entire road during 1899 were 1.190 cents, Exhibit 1.

We submit that what Mr. Nay designates as the net cost would in fact constitute an ample and sufficient revenue for the carriage of freight, as it allows operating expenses in full, interest on its bonded debt in full, and a dividend upon its stock; and we think this court would say, if it were called upon to pass upon that question, that schedules which would

yield an average return of 1.112 cents per ton per mile would be, at least as to the carrier, fair and reasonable.

If this is true, that an average rate of 1.112 cents would be reasonable, it could hardly be claimed that a rate of 1.115 cents upon hard coal in car load lots would be unreasonable, and if the test proposed by counsel was again made, and that schedule applied to the entire traffic, as suggested by counsel at page 50 Record, it would yield a revenue of $4,691.43 more than would the average rate of 1.112 cents; or, if Mr. Nay is correct, that the Commission's rate averaged 1.118 cents, it would increase the earnings $9,382.86 above the amount which would be earned at 1.112 cents.

Now, what does all this show? Simply that the rates on hard coal in car load lots were exhorbitant, that for some reason, which no one has tried to explain, a commodity which, under all the accepted rules governing freight rates, should be carried for a low rate, has been charged a high one, one far above the average, although its class was far below.

It cannot be claimed, therefore, that under the order of the Commission the plaintiff in error would be required to perform the services ordered at a loss. While, on the contrary, we submit that it does affirmatively appear that these particular services can be rendered at the rate provided for in the order of the Commission at a large profit.

The entire annual reduction which would be caused by the enforcement of the Commission's rates would be, according to the computations contained in Exhibit 4, $1,409.72, a very paltry sum when it is considered that the total freight earnings of the road were $2,025,499.82, and the total freight earnings on the three divisions affected by the order were $700,493.94.

But we do not rest this case upon the claim that where the reduction from total earnings is slight, that such fact justifies the rate. Our claim is that the testimony in this case establishes, as fully as it is possible to establish the correctness of a rate on a single commodity, that the rate ordered by the Commission is just and reasonable. This, of course, is a most perplexing question to determine, but it seems to us that it is fully determined in this case by the comparisons which we

have made with the total earnings, the average rate, and the returns received by the ralroad company from the old rates.

There may be some doubt as to the value of comparisons, but inasmuch as the plaintiff in error has made some, we may be permitted to do the same.

	Cents.
The rate per ton per mile which the Duluth road receives under this order, and which it is willing to accept, is	.625
Average rates to points on Great Northern, Exhibit 5..	1.037
Average rates to points on Northern Pacific, Exhibit 5..	1.127

Whenever competition is met, the rates go far below those fixed by the Commission. For instance, on shipments to some points the St. Paul & Duluth road accepted a rate of about one-half a cent per ton per mile. (Hopkins' testimony, Record pages 83-85.)

Instead, therefore, of overcoming the presumption in favor of the Commission's rate, the plaintiff in error proved that it, at least, had no cause for complaint.

The judgment should be affirmed.

W. B. DOUGLAS,
Attorney General, Minnesota.

THOS. D. O'BRIEN,
IRA B. MILLS,
Of Counsel.

Supreme Court of the United States.

No. 131.—October Term, 1901.

The Minneapolis and St. Louis Railroad Company, Plaintiff in Error, *vs.* The State of Minnesota ex rel. The Railroad and Warehouse Commission.	In error to the Supreme Court of the State of Minnesota.

[June 2, 1902.]

This was a petition for a mandamus filed in the District Court of Ramsey County by the State, upon the relation of the Railroad and Warehouse Commission, against the Minneapolis and St. Louis Railroad Company and several other railroad companies, (the first of which alone answered and sued out this writ of error,) to compel such companies to adopt and publish a joint through rate fixed by the Commission upon shipments of hard coal in carload lots, from the city of Duluth to certain points in the southern and western parts of the State of Minnesota, and to enjoin them from demanding or receiving any greater sum for such through shipments than that fixed by the Commission.

The facts are substantially as follows: The St. Paul and Duluth Railroad Company, a corporation of the State of Minnosota, operates a line of railroad from Duluth upon Lake Superior to the cities of St. Paul and Minneapolis. Its local rate upon hard coal in carload lots from Duluth to these twin cities was $1.25 per ton, the reasonableness of which local rate is conceded. The Minneapolis and St. Louis Railroad Company, also a corporation of the same State, operates a line of road from St. Paul and Minneapolis southerly through Hopkins, a station nine miles from Minneapolis, to Albert Lea in said State, thence still southerly to Angus in Boone County, Iowa. At Albert Lea and Angus it connects with other railroads, and by virtue of traffic arrangements has access to all the principal markets. It also owns and operates a branch line extending from a connection with its main line at Hopkins, westerly nine-two miles to Morton, Minnesota, at which point it connects with a railroad owned and operated by the Wisconsin, Minnesota and Pacific Railroad Company, which extends westerly from Morton to Watertown in South Dakota. Winthrop is a station upon the line of the Minneapolis and St. Louis road between Hopkins and Morton, sixty miles west of Hopkins, and at the time the order of the Commission was made the Minneapolis, New Ulm and Southwestern Railroad had constructed and owned a short line of railroad extending south from Winthrop to New Ulm in Brown County. The

capital stock of the last-named company was owned by the Minneapolis and St. Louis Railroad Company; but it was nevertheless a separate and independent corporation.

Both the St. Paul and Duluth Railroad Company and the Minneapolis and St. Louis Company are fully equipped to conduct the business of common carriers, have complete track connections and transfer facilities at St. Paul and Minneapolis, and for a long time have been engaged in transporting hard coal in carload lots without change of cars from Duluth to the points upon the line of the Minneapolis and St. Louis road for a joint through rate, which had been established by the mutual agreement of the companies, and which had been divided between them according to that agreement. In dividing earnings under this joint tariff, to which not only the two principal defendants were parties, but the Minneapolis, New Ulm and Southwestern Company, and the Wisconsin, Minnesota and Pacific Company were also parties, there was first set apart to the St. Paul and Duluth Company $1.00 per ton for transporting the hard coal from Duluth to Minneapolis, the remainder being turned over to one or more of the other three companies participating in the carriage of the coal to its destination.

On September 22, 1898, the Railroad and Warehouse Commission, having resolved to investigate the reasonableness of this joint rate, made an order upon all these railroad companies to answer as to the reasonableness of such rate. The companies duly appeared and took part in the investigation, and on January 19, 1899, the Commission made an order whereby it determined that the joint rate then in force for transporting hard coal from Duluth to the several stations west of the twin cities was unreasonable and unjust, and ordered a reduction to another rate found by the Commission, which was published and served upon the companies, as required by the State laws, but was disregarded by the railroads interested. Under the rate so fixed the St. Paul and Duluth Company was allowed $1 per ton from Duluth to Minneapolis, which was the same price previously agreed upon between the parties, the remainder to be paid to the Minneapolis and St. Louis Company, which was left to settle with the Minneapolis, New Ulm and the Southwestern and the Wisconsin, Minnesota and Pacific Companies for services rendered by those companies in the transportation of coal to points upon their respective roads. Neither of the companies filed or posted schedules of the new tariffs as required by law, and the plaintiff in error, the Minneapolis and St. Louis Railroad Company, on March 3, 1899, and six weeks *after* the Commission made its order, withdrew all tariffs on hard coal in cartload lots which had been established under agreement with the Duluth road.

Whereupon this proceeding was taken in the District Court of Ramsey County to compel the railroad companies to comply with the order of the

Commission. After trial, judgment was rendered by that court, confirming the order of the Commission, directing the issue of a writ of mandamus as prayed; and the judgment so rendered was affirmed upon appeal by the Supreme Court of Minnesota in *State* v. *Minneapolis & St. Louis R. R. Co.*, (80 Minn. 191.)

Whereupon the Minneapolis and St. Louis Railroad Company, against which the full amount of the reduction by the Commission was assessed, sued out this writ of error.

Mr. Justice BROWN delivered the opinion of the Court.

This case raises two questions: (1) The constitutionality of an act of the legislature of Minnesota passed in 1895, creating a Railroad and Warehouse Commission and defining its duties, (the material portions of which are printed in the case of *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287,) in so far as it assumes to establish joint through rates or tariffs over the lines of independent connecting railroads, and by virtue of which it assumes to arbitrarily apportion and divide joint earnings; (2) Whether the tariff fixed by the Commission is wholly inadequate and not compensatory.

1. The constitutionality of the act of 1895 is attacked upon the ground that it authorizes the railway commission of the State to compel two or more railroad companies to enter into a joint tariff, and to make and adopt a joint rate for the transportation of property over the lines of such companies, as well as to make a division and to apportion the joint earnings among the several companies interested. It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be performed. This argument in its various applications is one which has been addressed to and considered by this court in nearly every case in which the power of the State to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is impossible for the State to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in *Munn* v. *Illinois*, (94 U. S. 113,) to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occu-

pations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality, the latter being practically compelled to submit to such terms as the former may choose to exact, unless the State shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges.

The argument for the railroad companies in this case assumes that, while the State may interfere as between the railways and their customers, the shippers of freight, it cannot do so as between the railways themselves, by fixing joiut tariffs and apportioning such tariffs among the several railways interested in the transportation. The practical result of that argument is this, that if there were within a certain State five connecting roads of 100 miles each in length, which among themselves had established a joint tariff for the whole 500 miles, the State would be powerless to interfere with such tariff, though its right to do so would be unquestioned if the whole 500 miles were owned and operated by a single company. To state such a propoosition is practically to answer it. Granting that a State has no right to interfere with the internal economy of a railroad farther than to secure the safety and comfort of passengers, as, for example, to fix the wages of employés or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned.

There is an underlying fallacy in the argument of the railroad company in this connection, that the sum of two reasonable local rates cannot be unreasonable; and, as it is admitted that $1.25 per ton is a reasonable local rate for transporting coal from Duluth to Minneapolis over the St. Paul and Duluth road, and that the local rates for coal from Minneapolis to the designated stations westward and southward are also reasonable, it is impossible that a through rate from Duluth to the same stations which does not exceed the aggregate of these two rates can be unreasonable. We cannot assent to this proposition. The practice of railways in this country is almost universally to the contrary, and a through tariff is almost always fixed at a less sum than the aggregate of local tariffs between near-by stations upon the same road. Doubtless the fixing of a lower through tariff is dictated largely by a desire of each road to get as much mileage as possible from its patrons, as well as by an effort to meet competition over other lines doing business between the same termini; but in addition to this there is an increased cost of local business over through business in the additional fuel consumed and the increased wear upon the machinery of each train involved in stopping at every station. These facts were noticed by Mr. Justice Brewer in the opinion of the court in *Chicago &c. Railway Company* v. *Tompkins*, (176 U. S. 167,) in which he makes the following observations:

"Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same; but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from the main to side tracks is greater; there are the wages of the employes at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true, when there are two separate trains, it is more so when the same train carries both local and through freight."

We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several States, (*Cincinnati &c. R. R. Co.* v. *Int. Com. Com.*, 162 U. S. 184,) and that, if the power of the State commission were limited to the tariffs of a single road, it would be wholly inefficacious in a large number, if not in a majority, of cases—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the State to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the Commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis and St. Louis Company. It may, also, be said in this connection that in *Wisconsin &c. R. R. Co.* v. *Jacobson*, (179 U. S. 287,) we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines. The case did not involve the right of the Commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion, they are in favor of such right. See, also, *Burlington &c. Rwy. Co.* v. *Dey*, (82 Iowa, 312, 338.) All that we are required to hold in this case is that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related only to transportation over a single line.

2. The more difficult question is that connected with the reasonableness of the rates. The presumption is that the rates fixed by the Commission

are reasonable, and the burden of proof is upon the railroad companies to show the contrary. (*Dow* v. *Beidelman*, 125 U. S. 680; *Chicago &c. R. R. Co.* v. *Tompkins*, 176 U. S. 167, 173.) Indeed, the act itself provides, section three, subdivision C, "the rates established by said Commission shall go into effect within ten days, . . . and from and after that time the schedule of rates so established shall be *prima facie* evidence in all the courts of this State that such through rates are reasonable for transportation of freight and cars upon the railroads over which such schedule shall have been fixed."

In fixing the through rates for hard coal in carload lots from Duluth to interior points in Minnesota, the Commission set apart to the St. Paul and Duluth Company $1.00 per ton of the joint tariff, and as this was the same amount which that road had received under the prior arrangement, no question is made as to its reasonableness, and no appeal was taken by that road. The remainder of the joint tariff is paid to the Minneapolis and St. Louis Company, plaintiff in error, which was left to settle with the other roads interested in the tariff.

According to the tariff fixed by agreement between the companies prior to the action of the Commission a charge was made from Duluth to Hopkins, nine miles from Minneapolis, of $1.75, of which $1 was paid to the St. Paul and Duluth road (160 miles) and the remainder, 75 cents, to the Minneapolis and St. Louis road for a transportation of nine miles. This rate was gradually increased to stations beyond Hopkins until Norwood, forty miles from Minneapolis, was reached, where it was fixed at $2.50. The same rate was retained to Boyd, 153 miles from Minneapolis. This rate of $2.50 appears to have been a purely arbitrary one, and indicates pretty clearly, as observed by the Supreme Court, that the defendant was either carrying coal to Boyd at a loss or was collecting too much tariff per ton on the same article transported to Norwood, although there may have been, as observed by the court, commercial conditions which made them necessary. The Commission reduced the rate to Hopkins from $1.75 to $1.32, and to Norwood from $2.50 to $1.57, gradually increasing that rate to Boyd, where it was fixed at $2.48, but two cents less than that fixed by the joint tariff theretofore agreed upon. The average rate allowed per ton per mile to the Minneapolis and St. Louis road under the tariff so fixed by the Commission was 1.115, while the old rate charged for this service was 1.784.

This rate, fixed by the Commission only upon hard coal in carload lots, was not met by any showing that at the rates fixed by the Commission there would be no profit or an insufficient profit upon the coal so transported, but by evidence that upon the hard coal received from Duluth for the year ending June 30, 1899, 2,483 tons, the proportion allotted to the Minneapolis and St. Louis Company would be $3,874.50, while if the Commission's rates had been in effect for the same rate this proportion would

have been $2,464.78, a loss of revenue for the year of $1,409.72, as shown more clearly by the following table:

Total tons of hard coal received from Duluth for year ending June 30, 1899	2,583 tons.	
M. & St. L. R. R. proportion on old rate, 2,583 tons @ $1.50		$3,874 50
Had commissioners' rates been in effect for same period, M. & St. L. R. R. proportion would be		2,464 78
Loss of revenue to M. & St. L. R. R. for year..		$1,409 74

As suggested by the Supreme Court of the State, this loss seems to be a trifling one when we consider that the total freight earnings on the divisions affected by this order were over $700,000 for that fiscal year.

The principal testimony, however, was intended to show that, if the rate fixed by the Commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses. But it also appears that if the old rate upon hard coal in carload lots agreed upon by the roads were adopted as an average rate for *all* freights, the freight earnings of the road would have been largely increased. This would indicate that the rate fixed for coal must have been above the average rate, although coal is classified as far below the average.

It is quite evident that this testimony has but a slight, if any, tendency to show that even at the rates fixed by the Commission there would not still be a reasonable profit upon coal so carried. It was not even shown that the joint tariff fixed by the roads themselves upon coal was not disproportionately high as compared with rates upon other articles or as gauged by a proper classification. The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots, and that even in proving that the cost of transporting *all* merchandise exceeded the rate fixed by the Commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses. It was shown that coal belongs to one of the lowest classes of freight, and this is particularly true of the coal received from Duluth at Minneapolis, which was delivered at the Minneapolis and St. Louis Company upon their tracks at Minneapolis. Besides this, coal in carload lots was a comparatively insignificant item of the total freight carried, being but 2,583 tons for an entire year. True, it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the Commission, in considering a proper reduction upon a

certain class of freight, ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low. The charges for the carriage of freight of different kind are fixed at different rates according to their classification, and this difference, presumably at least, is gauged to some extent by a difference in the cost of transportation, as well as the form, size and value of the packages and the cost of handling them.

Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In *Smyth* v. *Ames*, (169 U. S. 466,) we expressed the opinion (page 541) that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons or property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by section 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the State commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular. As we said in *Smyth* v. *Ames*, (page 547,) "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." The very fact that the Commission, while fixing the rate to Boyd at 82.48, within two cents of the amount theretofore charged by the companies themselves, gradually reduced that rate in proportion to the mileage, to Norwood, where it was fixed at $1.57, while the company charged an arbitrary rate of 82.50 to Norwood, and to all the stations between Norwood and Boyd, tends, at least, to show that the rates were fixed upon a more reasonable principle than that applied by the companies.

In exercising its power of supervising such rates the Commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the Commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be within the power of the Commission to compel such a tariff, it would not upon the other hand be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders. Each case must be determined by its own considerations, and while the rule stated in *Smyth* v. *Ames* is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the capital invested, it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it.

It is sufficient, however, for the purpose of this case to say that the action of the Commission in fixing the rate complained of as to this particular class of freight has not been shown to be so unjust or unreasonable as to amount to a taking of property without due process of law, and we therefore conclude that the judgment of the Supreme Court must be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.